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1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK  
3 -----x

4 ADONNA FROMETA,

5  
6 Plaintiff,

7 v. 07 CV 6372 (HB)

8 MARIO E. DIAZ-DIAZ and  
9 ALL AMERICAN HAULERS RECYCLING,

10 Defendants.

11 -----x

12 New York, N.Y.  
13 September 9, 2008  
14 9:30 a.m.

15 Before:

16 HON. HAROLD BAER

17 District Judge  
18 - and a jury -

19 APPEARANCES

20 SLAWEK W. PLATTA, PLLC  
21 Attorneys for Plaintiff  
22 BY. SLAWEK W. PLATTA

23 WILSON ELSEER MOSKOWITZ EDELMAN & DICKER LLP  
24 Attorneys for Defendants  
25 BY: STUART A. MILLER  
MICHAEL W. COFFEY

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1 (Trial resumed; jury present)

2 THE COURT: Good morning, ladies and gentlemen. I'm  
3 delighted that you were on time, but I'm sorry that I wasn't.  
4 I think we are ready to go.

5 Can we swear the witness.

6 RANGA KRISHNA,

7 called as a witness by the Plaintiff,

8 having been duly sworn, testified as follows:

9 DIRECT EXAMINATION

10 BY MR. PLATTA:

11 Q. Good morning, Dr. Krishna.

12 A. Good morning, sir.

13 Q. Dr. Krishna, do you know Ms. Adonna Frometa?

14 A. Yes.

15 Q. When was the first time that you met her?

16 A. I saw her as a patient on March 29, 2007.

17 Q. And at that time what were her complaints?

18 THE COURT: First, let's find out if he's a dentist or  
19 medical doctor or some in between.

20 MR. PLATTA: Judge, thank you.

21 Q. Dr. Krishna, can you tell us your credentials?

22 A. Yes. I'm licensed to practice medicine in the State of New  
23 York since 1993. I completed my training in the field of  
24 neurology at Mt. Sinai Medical School and Medical Center. I  
25 then was awarded a position as a chief resident in the field of

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1 neurology at the Mt. Sinai Medical School and Medical Center in  
2 1993 to 1994. I was then subsequently awarded a fellowship in  
3 the field of epilepsy, epilepsy surgery, neuromuscular diseases  
4 and neurophysiology at the Hospital for Joint Diseases in the  
5 New York University School of Medicine. After completing the  
6 same I'm in my current private practice and my location in the  
7 Bronx and Brooklyn. I'm an attending physician in the field of  
8 neurology at the New York Methodist Hospital, Brooklyn  
9 Hospital, Coney Island Hospital.

10 I'm also a diplomat in the American Board of  
11 Psychiatry and Neurology in the field of neurology. I also  
12 completed a specialty examination in the field of pain  
13 management by the American Academy of Pain Management. And I  
14 also completed certification by the American Board of  
15 Independent Medical Examiners. I'm currently in private  
16 practice in Brooklyn and in my Bronx location. I saw this  
17 patient in my Bronx location.

18 Q. Doctor, are you board certified?

19 A. In neurology.

20 THE COURT: I told you yesterday, you got to sort of  
21 remember the questions so you don't ask him too many times.

22 MR. COFFEY: No objection, your Honor.

23 THE COURT: He's an expert.

24 MR. PLATTA: Thank you, your Honor.

25 Q. Dr. Krishna, what were Ms. Frometa's complaints during her

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1 first visit?

2 A. She was having pain, neck and back pain after an accident  
3 that had occurred on February 14 of 2007. She was at that time  
4 a 37-year-old patient. She was a driver of a motor vehicle  
5 that was struck in the rear and was experiencing neck and back  
6 pain. She came to us because of the symptoms had not improved.  
7 Her treating physician, Dr. Villafuerte, had also requested a  
8 neurological opinion and, therefore, she came and sought a  
9 consultation with us. And she was experiencing symptoms that  
10 were unrelenting for which she was seen by myself for a  
11 neurological evaluation.

12 Q. Doctor, what was the course of treatment that you  
13 recommended for her?

14 A. I recommended that she obtain change in her physical  
15 therapy, medication change. And I suggested that she obtain a  
16 pain management evaluation and/or spine surgical evaluation.  
17 Both were done subsequently thereof.

18 Q. Did you also suggest any limitations regarding her work?

19 A. Yes. I also suggested that she refrain from any activities  
20 that required her to sit, stand, and repetitively move, which  
21 were part of her work activities. She was having a great deal  
22 of radiating pain down her arm and leg, resulting in numbness,  
23 weakness, and sensory complaints.

24 Q. What was your finding why she had such pain?

25 A. Her clinical findings revealed focal abnormalities in the

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1 upper extremity on the right side and lower extremity on the  
2 left side.

3 Q. Can you explain to us what the focal abnormality means?

4 A. The nerve roots in our spine innervate the muscles in our  
5 arms and legs so that as the nerves exit the brain into the  
6 spinal cord, the spinal cord parses out various nerve roots to  
7 different body parts. The nerve root in our neck goes into the  
8 arms. The nerve roots in our back go into the legs so that if  
9 a nerve root in our neck, either on the right side or left  
10 side, is in some way compromised, it translates into patient's  
11 subjective symptoms of pain, sensory complaints, such as  
12 numbness, tingling, et cetera, and weakness. Some of those can  
13 be present. Not all of those have to be present. Those are  
14 the subjective symptoms that a patient is experiencing.

15 The objective findings that a physician identifies  
16 when examining the patient include sensory problems on testing  
17 the patient with pinprick sensation, motor weakness, reflex  
18 abnormalities, and range of motion abnormalities.

19 In this patient I found that she had motor weakness in  
20 the shoulder girdle muscles and some in the lower extremity,  
21 which conform to the C5 nerve root and the L5 nerve root. And  
22 what that means is that the spine in the neck is categorized as  
23 the cervical spine and it has -- it is used commonly in medical  
24 terms as an abbreviation C. So the nerve root coming out of  
25 the C5 level was clinically abnormal on examination. The nerve

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1 root coming out of L5 level in the lower extremities was  
2 clinically abnormal. And this was identified on my examination  
3 based on weakness in those muscle groups, sensory loss in that  
4 area, and abnormal reflexes that corresponded to that area.

5 And what a reflex means is that when you go to your  
6 doctor and you sort of cross your knee over and the doctor taps  
7 your knee and the knee jerks out, that's considered a reflex.  
8 That doesn't happen just because the doctor is tapping your  
9 knee. It happens because the nerve going to that knee tendon  
10 is actually functioning. If that nerve is in some way  
11 compromised, the reflex will either be lost or diminished. In  
12 this case it was diminished in the C5 distribution of the neck  
13 and the L5 in the lower back.

14 Q. Doctor, did you review MRI films in this case?

15 A. Yes. I had the option to review the films and reports.

16 Q. Doctor, I will ask you to use the table that I presented  
17 the jury yesterday to show the description of the injury that  
18 you just gave.

19 THE WITNESS: May I stand up, Judge, and look?

20 THE COURT: Absolutely. Go right ahead, if there is a  
21 question.

22 Q. Doctor, could you describe for the jury, using this diagram  
23 and the depiction of the spinal cervical MRI, the injury that  
24 my client sustained?

25 A. Yes.

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1 MR. COFFEY: Objection.

2 THE COURT: Overruled.

3 A. This is a picture of an MRI of the cervical spine. Just to  
4 give you a background of what an MRI is, we in medicine have  
5 the ability to look at the body from inside out by several  
6 diagnostic tests. The most common diagnostic test that we have  
7 had for years and years and years is the X-ray machine. The  
8 X-ray machine is useful in looking at bony or calcified areas  
9 of our body. It's not good and very useful for soft tissue  
10 body parts like disks, spinal cord, and nerve roots, et cetera.

11 The MRI is a more sophisticated medical tool and if  
12 you've not had one, it's basically a machine like a tube. You  
13 lie down on a gurney or flatbed and your body goes through that  
14 machine. And the machine, very much like a baker, would slice  
15 a loaf of bread, slices the body into thin slices, like a loaf  
16 of bread. And if you look at a slice of bread, the bread has  
17 two open sides that you can see and it has a thickness. And  
18 the MRI allows you to look at both sides of the slice and gives  
19 you a picture of what the body looks like from inside out so  
20 that you don't actually have to open the body. In this case,  
21 this is an MRI view of Ms. Frometa's cervical spine. The  
22 cervical spine, if you can look closely, it has these sort of  
23 rectangular parts which are known as the vertebral bodies, and  
24 these are the pillars of our spine, the bony pillars of our  
25 spine.

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1           In between you have a donut-like structure which looks  
2 almost from the side view, looks almost like an oval structure.  
3 That's the hydraulic mechanism of our spine and that's  
4 considered the disk or disk material right behind this central  
5 line of dark shadow that comes in from the top which is where  
6 the brain sits up here. It is called the spinal cord. And  
7 that's the core where the nerve roots are coming out of.

8           At different levels you'll notice that the disk has  
9 actually gone beyond and creates a shadow beyond its  
10 parameters. And what are the normal anatomical parameters?  
11 The normal anatomical parameters of a disk are the bone above.  
12 That's this rectangular bone above and then an imaginary line  
13 drawn below to the rectangular bone below. When the disk  
14 exudes or goes beyond that margin it can be termed medically as  
15 either a bulging disk or a disk protrusion or a disk  
16 herniation, depending on order of severity and what is  
17 identified on the MRI.

18           In this case, Ms. Frometa has a bulging disk at the  
19 C2-C3 and C4-C5 levels. She also has a disk herniation at the  
20 C3-C4 level which is sort of abutting. And if you look at the  
21 spinal canal, this white line that goes around the spinal cord,  
22 that's that fluid that surrounds the spinal cord to give it a  
23 little bit of protection. The disks are pressing, some of them  
24 are pressing against the coverings of the spinal cord.

25           There is also, down below, in the thoracic level, a



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1 disk herniation at the P1-P2 and P2-P3 levels. So there is  
2 several abnormalities in the cervical spine and because this  
3 MRI was done in the cervical spine we were able to get a  
4 glimpse of the upper thoracic level also. We find that there  
5 are several abnormalities. These are what were clinically  
6 causing her sensory complaints, pain, and objectively causing  
7 her -- some of them were causing her weakness and motor  
8 weakness and sensory problems.

9 Q. Thank you, Doctor. I'll ask you to do the same with the  
10 lumbosacral MRI. I'll put it on.

11 MR. COFFEY: Objection.

12 THE COURT: Overruled.

13 A. The lower back of our spine is called the lumbar and  
14 lumbosacral region of the spine. It's sort of this part of the  
15 spine which I'm pointing to right above the buttocks. And that  
16 part of the spine is visualized in this -- as you take the  
17 picture, the upper left inside corner picture of this screen  
18 which shows you the bones and disk material in between and the  
19 spinal canal with its contents.

20 The lumbar component of the spine and lumbosacral  
21 component of the spine is anatomically and structurally similar  
22 to the cervical. It has the same architecture, the bone, the  
23 disc, and the spinal canal. Here, Ms. Frometa has a disk  
24 bulge, as read, at the L3-L4 and L4-L5 level with a disk height  
25 that was lost at the L5-S1 level. There is also some extension

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1 of this material into the canal with spurring and some  
2 herniation of the disk material. The patient's clinical  
3 findings are related to in the lower extremities, are related  
4 to the back disk problem causing pain, numbness, and weakness  
5 at the L5 levels.

6 The patient has, as you can see in this artist's  
7 rendition of the same MRI film, has a disk herniation which is  
8 exuded beyond the margins of the bone above and bone below if  
9 you draw that anatomical line, which is imaginary, and causing  
10 compression and pain along -- causing compression along the  
11 spinal canal, which can translate into pain, sensory loss and  
12 weakness.

13 THE COURT: My understanding, by the way, is this is a  
14 stipulated exhibit. That's what it says on the piece of paper  
15 in front of you. It's hard for you to object if it was  
16 stipulated to.

17 Q. Doctor, hypothetically, if I would tell you that there is a  
18 doctor who states that by reading this MRI that he read as well  
19 that there was evidence of chronic degenerative disk disease at  
20 L5-S1 and this is manifest by disk space narrowing and disk  
21 desiccation and he will also state that there was a small  
22 superimposed central disk herniation at L5-S1 without evidence  
23 of nerve root compression, would you agree or would you  
24 disagree with such statement?

25 MR. COFFEY: I have an objection, your Honor.

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1 THE COURT: I am not quite sure to what, but go ahead  
2 and answer.

3 A. I would disagree with the statement because the  
4 degenerative component in medicine, as we are born into this  
5 world, we spend our lives degenerating over time, hopefully not  
6 too fast. So the problem is that we are not what we were when  
7 we were one day old. Everything undergoes wear and tear. As  
8 things undergo wear and tear, it does not necessarily mean it's  
9 pathologic or causes clinical problems that are functionally  
10 disabling. Because we wear and tear, we are able to live life  
11 normally, as much as possible, and continue our functional  
12 capacity.

13 Here we do have some signs of wear and tear. Parts of  
14 the bone in the lower parts have some signs of normal wear and  
15 tear. Parts of the disks have some signs of normal wear and  
16 tear, but there are signs of a traumatic event occurring also,  
17 like edema. The white parts inside some of the bone is  
18 considered edema. Edema is a swelling of a body part. And  
19 many of you may have fallen sometimes and found that you have a  
20 bruise. That's edema. Edema can occur externally or  
21 internally. In this case it has occurred internally. Edema is  
22 a sign of trauma. A disk herniation in the context of  
23 vertebral edema is consistent with a traumatic event occurring,  
24 causing the patient's symptoms.

25 Q. And, Doctor, with a reasonable degree of medical certainty

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1 can you state that this injury to the lower back is causally  
2 related to the accident of February 14, 2007?

3 A. Yes.

4 Q. And why?

5 THE COURT: Can you go back on the witness stand  
6 because I can hear you better.

7 THE WITNESS: Yes. Sorry.

8 Q. Why do you think it's related?

9 A. The patient's clinical symptoms, signs, and examination and  
10 findings, the MRI findings that show disk bulging, disk  
11 herniations at several levels, vertebral edema, all correlate  
12 to the patient's subjective symptoms and objective findings.  
13 They are consistent with the patient's chronology of  
14 complaints. And that is the main reason why I feel that the  
15 patient's findings are related to the accident of February 14,  
16 '07.

17 THE COURT: When did you see her for the first time,  
18 Doctor?

19 THE WITNESS: Approximately five weeks later, March  
20 29, after the imaging studies.

21 Q. Doctor, with a reasonable degree of medical certainty can  
22 you tell us whether the cervical injuries causally related to  
23 her accident of February 14 of 2007?

24 A. Yes. I believe the cervical injuries also causally related  
25 to the February 14, 2007 accident.

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1 THE COURT: Was there anything that you found that you  
2 concluded was not part of the results of that accident?

3 THE WITNESS: There is some bone spurring which is  
4 unrelated and nonpathologic.

5 THE COURT: That's all?

6 THE WITNESS: That's all.

7 THE COURT: That will save us half an hour. Thank you  
8 very much.

9 Q. Doctor, are you aware that Ms. Frometa received a steroid  
10 injections?

11 A. Yes. The patient was referred for pain management and  
12 spine surgical treatment. She had multiple procedures to her  
13 spine, both neck and back. Some of those were steroid  
14 injections.

15 THE WITNESS: May I stand up?

16 THE COURT: If he asks you.

17 Q. Doctor, from this neurological point of view, from your  
18 perspective, what effect does the steroid injection like this  
19 to the lower back have?

20 A. The epidural injection done to the lower back,  
21 especially -- is primarily done to get rid of the swelling  
22 that's around the canal of the spinal canal they are in that's  
23 being caused by the disk herniations and disk bulges as a  
24 result of this accident. This was done -- this was done  
25 approximately six and a half, seven months after the accident

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1 because the patient's clinical findings had not shown any signs  
2 of improvement with medications and therapy and conservative  
3 approach.

4 Q. And from your point of view, what kind of relief is  
5 supposed to happen after such injection?

6 A. There should be some pain relief and should be some symptom  
7 relief. And in this case the symptom relief should have  
8 occurred in the form of sensory improvement and functional  
9 capacity improvement with activities of her employment, et  
10 cetera. There was no sustained improvement.

11 Q. Doctor, are you aware that before she had this lumbar  
12 steroid injection, Ms. Frometa underwent surgery by Dr. Babu?

13 A. Yes.

14 Q. Doctor, from neurological point of view can you tell us  
15 what is the effect of this surgery on the patient?

16 A. The reason a patient undergoes surgery to the lumbar spine  
17 or any part of the spine is to remove the offending agent from  
18 compressing neuro elements. And that's the main purpose of  
19 doing that so that it does a couple of things: One, prevents  
20 further damage; two, it also prevents or improves the patient's  
21 clinical symptoms; and, three, it also improves their  
22 functional capacity. In this case, the disk at the L5 level,  
23 L5-S1 level was causing significant amount of pain, numbness  
24 and weakness and sensory and motor complaints. And the surgery  
25 was to remove some of that compression from the nerve root.

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1 Postsurgically the patient continued to have some symptoms and  
2 after conservative treatment the patient had some more pain  
3 management procedures.

4 Q. Doctor, can you explain for us whether you did an EMG NCV  
5 test?

6 A. Yes. The patient had an EMG or electromyographic test with  
7 nerve conduction studies. The EMG and nerve conduction studies  
8 were done to identify an underlying physiological cause for the  
9 patient's signs and symptoms. In medicine there are two basic  
10 principles that we use. We like to find an anatomical cause  
11 for the patient's diagnosis and a physiological cause. And  
12 that to me is structure and physiology is function.

13 With the MRI we can look at the structure of the  
14 spine, but it doesn't tell us the function of the nerve roots.  
15 With the EMG and nerve conduction study it tells us the  
16 function. And the function of the nerve roots were tested on  
17 my initial visit on March 29, 2007. This revealed a right C5  
18 and L5 radiculopathy. What that means is that nerve root --  
19 radiculopathy is where the nerve root at that level is inflamed  
20 or compromised so that the clinical findings that we were  
21 seeing on our exam, the patient's subjective complaints, came  
22 together with a physiological answer in conjunction with the  
23 anatomical answer on the MRI. So that all coordinates were  
24 pointing to the same diagnosis.

25 Q. Doctor, can you tell me if that actually substantiated the

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1 surgery that Dr. Babu did?

2 MR. COFFEY: Objection.

3 THE COURT: What's the ground for your objection?

4 MR. COFFEY: To ask him to a part about Dr. Babu's  
5 result.

6 THE COURT: I'll sustain the objection, but I am not  
7 sure if it's necessary, but it will speed things along.  
8 Sustained.

9 MR. PLATTA: Thank you.

10 Q. Doctor, can you tell me, what is the result of the positive  
11 EMG test, what is the kind of treatment that the patient can  
12 have following that?

13 A. Many patients have subjective complaints, may not have an  
14 anatomical cause and don't have a physiological cause. By  
15 that, I mean, no MRI findings and no EMG findings to  
16 corroborate their subjective complaints.

17 In this case that's not the case. We have an MRI that  
18 corroborates a patient's clinical findings and an EMG that  
19 corroborates the clinical findings. Now that we know that the  
20 diagnosis is an issue with the nervous system being  
21 compromised, we can treat the patient with certain medications  
22 and certain forms of therapy. If that does not impact the  
23 patient's outcome relatively soon, then we move forward as fast  
24 as possible to a more aggressive pain management intervention.  
25 That includes surgery, epidural injections, and/or combination



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1 of those treatments.

2 Q. Doctor, did you also perform the same test, the nerve test,  
3 EMG test, following the surgery and, if so, what were your  
4 findings?

5 A. Yes. I performed it most recently on May of this year, May  
6 8 of this year.

7 Q. And what were your findings? Did her condition change  
8 following this surgery?

9 A. No. It still revealed a chronic right-sided cervical  
10 lumbar radiculopathy with active irritative features.

11 Q. Can you tell me if your test, EMG NCV test, is it  
12 subjective or objective?

13 A. It's objective. It's beyond the control of the patient.

14 Q. She would not be able to fake that?

15 A. No. It's beyond the control of the patient.

16 Q. And, Doctor, are you aware that Dr. Davy performed a  
17 percutaneous discectomy on this patient?

18 A. Yes.

19 Q. Are you also aware that there were steroid injections to  
20 her cervical spine done prior to his surgery?

21 A. Yes.

22 THE COURT: Where are we going, Mr. Platta? We have  
23 had this testimony yesterday from the horse's mouth?

24 MR. PLATTA: I'm combining neurological findings,  
25 Judge, with the surgeries that she actually had. There was a

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1 connection between both of them, actually.

2 THE COURT: Ask him what the connection is.

3 MR. PLATTA: Thank you.

4 Q. Doctor, in regards to the neurological findings --

5 THE COURT: I'll ask the question. Is there any  
6 connection between those two, the neurological and the other  
7 efforts that were made for Ms. Frometa?

8 THE WITNESS: Yes. Those efforts were primarily made  
9 because the neurological findings were present. The  
10 neurological findings were fixed, and they revealed significant  
11 abnormalities, and those efforts were embarked upon to treat  
12 the neurological findings.

13 THE COURT: How did they come out?

14 THE WITNESS: It wasn't a successful outcome.

15 THE COURT: Anything else?

16 MR. PLATTA: Yes.

17 Q. Doctor, can you tell us whether the percutaneous discectomy  
18 that Dr. Davy performed on this patient in December of last  
19 year changed anything in her neurological condition based on  
20 your findings from the EMG?

21 A. There was no change.

22 Q. What is the next course of treatment that you can recommend  
23 for this patient?

24 A. She had trial of spinal cord stimulator for her symptoms.  
25 It wasn't successful. I think the only other course that's

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1 remaining is potentially resurgical evaluation and treatment  
2 with fusion.

3 Q. Can you tell us what is the connection between your  
4 positive finding, the same finding as you had last year, in the  
5 EMG test and the neurostimulator trial implant?

6 A. I'm sorry.

7 Q. Is there any connection between the findings from your EMG  
8 positive findings, following both of her surgeries and the  
9 implant of the neurostimulator; in other words, is this a  
10 natural course of treatment?

11 A. It is a natural course of treatment. The neurostimulator  
12 trials are done to alleviate the patient's subjective pain  
13 symptoms and improve some of the objective functional capacity.  
14 If it doesn't work, then it's removed.

15 Q. And did you have a conversation with Dr. Davy as to whether  
16 it was successful or not, both of them?

17 A. He felt they were not successful.

18 Q. What is the next step for Ms. Frometa following that?

19 A. Is to recircle back with spine surgical treatments.

20 Q. What would you recommend?

21 A. The current -- given her current anatomical abnormalities  
22 and her failure to many conservative treatments and  
23 interventional procedures, the only remaining procedures that  
24 would be left would be fusion, both at the cervical and lumbar  
25 levels, and to modify her medication regime after that to try

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1 to get a combination that gives her best relief. There is no  
2 hope for 100 percent relief at this point.

3 Q. Doctor, if I were to tell you that there would be,  
4 hypothetically, a doctor testifying here that regarding her  
5 cervical spine that there is a straightening of the cervical  
6 lordosis and there is also evidence of chronic degenerative  
7 disk disease and that is manifested by osteophyte formation and  
8 there is also small superimposed disk herniation at C3-C4  
9 without evidence of spinal cord or nerve root compression, can  
10 you tell me if you would agree with this finding or you  
11 actually have some different finding regarding her cervical  
12 spine MRI?

13 A. I don't disagree with the evidence of the degenerative  
14 changes in the cervical spine -- I mean, I disagree with the  
15 evidence of degenerative changes in the cervical spine.

16 Q. And, Doctor, you testified before that she had some  
17 degeneration in the lower back. Can you tell us whether  
18 degenerative change in the spine could be asymptomatic?

19 A. Yes. Many times mild degenerative changes like bone  
20 spurring can be asymptomatic throughout our lives and doesn't  
21 usually impact our day-to-day functional capacity.

22 Q. And in this case, did you have any information about any  
23 kind of treatment that Ms. Frometa had prior to February 14 of  
24 2007 regarding her spine?

25 A. There is no documentation of prior treatment.

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1 Q. Are you aware that she had other accidents, motor vehicle  
2 accidents?

3 A. Yes.

4 Q. Which one would be important for your diagnosis, the fact  
5 that the patient has some kind of bumper-to-bumper accidents or  
6 that she has treatment resulting from these accidents?

7 A. The key for us is that whether or not she had an accident  
8 that required any sustained treatment in the form of imaging  
9 studies, neurological evaluations, and/or pain management  
10 procedures. There was no such treatment in the past. Only  
11 after this accident, the clinical symptoms and signs seemed to  
12 have gone awry and not resolved with conservative treatment.

13 Q. Doctor, can you tell me, if you know, about any further  
14 treatment that Ms. Frometa had at your facility, at Westchester  
15 Medical Care?

16 A. She has undergone some therapy with physical therapy and  
17 underwent some lumbar strengthening treatments in the past with  
18 a chiropractic treatment and found they really did not help.  
19 She is following up with Dr. Davy for spinal cord stimulator  
20 implantation and postimplantation treatments.

21 Q. Doctor, do you remember being contacted by Dr. Charles  
22 Kincaid, a life care expert in this case?

23 A. Yes, sir.

24 Q. And can you tell me if you recommended any kind of  
25 treatment; for example, psychiatric evaluation for Ms. Frometa

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1 in the future?

2 A. Yes. She had seen a psychologist for the pain management  
3 procedures. And given the complexity of her current clinical  
4 findings, she would need some psychological care as time goes  
5 on.

6 Q. And, also, what about psychology evaluation?

7 A. Yes, she would need that.

8 Q. Can you tell me what would be the cost, in your opinion,  
9 for both?

10 THE COURT: Sustained.

11 Q. Doctor, can you tell me if you're qualified in New York to  
12 assess no no-fault rates for?

13 MR. COFFEY: Objection.

14 THE COURT: Sustained.

15 Q. Do you know what is a peer review?

16 A. Yes.

17 Q. Can you tell me it is?

18 A. It's a review done by independent third-party physicians  
19 who specialize in reviewing the necessity and fee structure for  
20 certain procedures. In my case it's primarily neurological and  
21 pain management related services.

22 Q. Would you be aware of the rates attributable to the New  
23 York area for treatment of patients?

24 A. Yes. These are published guidelines by the New York State  
25 Workmens Compensation Guidelines.

899MFROT

Krishna - direct

1 Q. If I were to tell you hypothetically that the psychiatric  
2 evaluation was estimated to cost \$333.03 per unit, would you  
3 agree with this opinion?

4 THE COURT: Sustained.

5 Q. Doctor, can you tell me if you also recommended for  
6 Ms. Frometa gym membership?

7 A. Yes. I had recommended that in the past.

8 Q. Do you know the cost for same?

9 A. Yes. The cost based on what she had identified was  
10 approximately listed in my report, \$18,000 total.

11 THE COURT: Forever?

12 THE WITNESS: No. That was for her trainer and for  
13 membership.

14 THE COURT: Forever?

15 THE WITNESS: Not forever.

16 THE COURT: For how long?

17 THE WITNESS: Annualized.

18 Q. Doctor, did you also recommend for this patient additional  
19 MRI of the cervical and lumbar spine?

20 A. Yes.

21 Q. And what would be the cost of that?

22 A. The cost of ten MRIs over a lifetime for the cervical and  
23 lumbar spine was approximately \$30,000.

24 Q. And, Doctor, are you aware of any medication that  
25 Ms. Frometa is taking at this time? I will withdraw the

899MFROT

Krishna - direct

1 question.

2 Did you prescribe any medication for Ms. Frometa?

3 A. Yes. There are medications for her pain modulating agents.

4 Q. Doctor, did you also recommend for Ms. Frometa to see a  
5 psychologist?

6 A. Yes.

7 Q. What would be the cost of that?

8 MR. COFFEY: Objection.

9 THE COURT: Sustained.

10 Q. Doctor, did you also recommend for Ms. Frometa to have a  
11 home health aide in case the neurostimulator implant is not  
12 successful?

13 MR. COFFEY: Objection.

14 THE COURT: I don't think so, right? Go ahead. You  
15 can answer it. I didn't hear any objection.

16 MR. COFFEY: I objected, your Honor.

17 THE COURT: Sustained. Put another question,  
18 Mr. Platta.

19 MR. PLATTA: Sure.

20 Q. Doctor, do you think Ms. Frometa will need any kind of  
21 assistance in the future from a neurological standpoint?

22 A. Yes. Given that she has family members helping her now,  
23 this is no guarantee of the future. And given her spine  
24 condition is significantly compromised, her need for future  
25 care to assist her with some of her daily chores is inevitable,



899MFROT

Krishna - direct

1 and that cost would be based on the cost of labor going  
2 forward.

3 Q. Doctor, when you mentioned before that she had physical  
4 therapy and chiro treatments at your office, do you know more  
5 or less until when and how many times, approximately?

6 A. She was seen two times a week, sometimes three times a  
7 week. Most recently she was seen until June of this year.

8 Q. Doctor, can you tell me what are your office expenses, how  
9 much does her chiropractor care cost so far?

10 A. I don't have the total expense. I think it was submitted  
11 as part of the evidence.

12 Q. Would you be able to estimate, more or less --

13 MR. COFFEY: Objection.

14 Q. -- based on the cost of the EMG?

15 THE COURT: We don't really want you to guess. If you  
16 have a reasonable estimate, that's fine. If not -- I have yet  
17 to see it. If you gather it's within the evidence, we will  
18 wait until when.

19 THE WITNESS: I think we submitted our bills with the  
20 evidence.

21 Q. Doctor, I will present you on the screen what is -- Doctor,  
22 can you tell me with a reasonable degree of medical certainty  
23 whether Ms. Frometa permanently lost the use of her spine as a  
24 result of this accident?

25 A. Yes.

899MFROT

Krishna - direct

1 Q. And that is why?

2 THE COURT: We have heard why in chapter and verse.  
3 Why do we need it again.

4 Q. Doctor, as a result of this accident has Ms. Frometa  
5 sustained an injury --

6 A. Yes.

7 Q. -- that would prevent her from performing her normal  
8 regular duties in her life; for example, work, social life,  
9 anything?

10 A. Yes. They would impair all of those aspects of her life.

11 Q. Doctor, as a result of the accident, did the plaintiff  
12 sustain a significant limitation of use of the spine?

13 A. Yes.

14 Q. Doctor, as a result of the accident, has the plaintiff  
15 sustained a permanent consequential limitation of use of the  
16 body organ or member?

17 A. Yes.

18 Q. And which body organ would that be applicable to?

19 A. The spinal canal and the spinal cord and nervous system.

20 Q. Doctor, are you aware that Ms. Frometa was working  
21 approximately until the end or the middle of April of 2007?

22 A. Yes.

23 Q. And are you aware that she wasn't working after the surgery  
24 that was performed by Dr. Babu?

25 A. That's correct.

899MFROT

Krishna - direct

1 Q. When you saw her did she ever indicate to you that she came  
2 back to work?

3 A. I had no notification of that.

4 Q. Doctor, with a reasonable degree of medical certainty, were  
5 the procedures that were performed in this case necessary,  
6 medically necessary?

7 MR. COFFEY: Objection.

8 THE COURT: I'll sustain the objection.

9 Q. Doctor, taking into consideration your neurological  
10 experience, would you recommend a patient like Ms. Frometa the  
11 same course of treatment that she received in this case?

12 A. Yes.

13 Q. And why is that?

14 A. Because she failed conservative treatment and when you fail  
15 conservative treatment for neurological deficits the only  
16 course of treatment that's available is a more aggressive  
17 approach, including surgical intervention and/or interventional  
18 pain management procedures like what she has obtained.

19 Q. Doctor, you mentioned before that there was a bone  
20 spurring. Can you tell us what it is and why it would not be  
21 related to the accident?

22 A. Yeah. The lower back at the lumbar spine, there is those  
23 rectangular areas are bones. Because the low back is a  
24 weight-bearing part of our body, as you grow older you can find  
25 some bone spurring. The bone spurring is on the opposite side

899MFROT

Krishna - direct

1 of the spinal canal. It's not related to the spinal canal so  
2 it's not really anatomically relevant.

3 Q. And, Doctor, when you reviewed the report that Dr. Kincaid  
4 prepared, the tables that he prepared for this trial, did you  
5 agree with the dollar amounts that he included in the treatment  
6 that he recommends?

7 MR. COFFEY: Objection.

8 THE COURT: Sustained.

9 MR. PLATTA: Your Honor, please note my exception.

10 Q. Doctor, can you tell us what are the activities of daily  
11 living that Ms. Frometa will not be capable of doing from your  
12 perspective?

13 A. The primary activities that would be restricted would be  
14 activities that require her to repetitively bend, push, and  
15 pull, and lift objects more than 25 pounds in weight. This  
16 could be as simple activities as grocery shopping to  
17 repetitively going up and down staircases in a subway station,  
18 to repetitively bending and pushing and pulling objects at  
19 home. And some activities would require assistance, like  
20 standing up from a toilet, bending over a sink so that you need  
21 to at least hold onto something or have somebody help her.  
22 These are activities that involve the flexibility and  
23 malleability of our spine. And given that the spine at two  
24 levels, the neck and back, have been compromised, this is a  
25 significant limitation that is afforded to her.

899MFROT

Krishna - direct

1 Q. Doctor, during your examination of this patient, did you  
2 have any clinical correlation to conclude that the disk  
3 herniation that she has in her cervical as well as lumbar spine  
4 will be the cause of any symptoms she reported to you?

5 A. Yes. The patient's clinical correlation included weakness,  
6 sensory abnormalities, and reflex abnormalities.

7 Q. Doctor, if hypothetically I will tell you that there will  
8 be a doctor who will come here to testify that the procedure  
9 performed by Dr. Davy for percutaneous discectomy using a  
10 striker device is not accepted in the mainstream of orthopedic  
11 and medical care as a beneficial mode of treatment for a  
12 cervical disk herniation, can you tell me if you agree with  
13 this statement?

14 A. I disagree.

15 Q. Why?

16 A. The striker device is an FDA-approved device. It's  
17 approved by the federal Food and Drug Administration for use  
18 for this diagnosis.

19 Q. In other words, you agree with Dr. Davy's procedure?

20 A. Yes. It's a device made for this procedure.

21 MR. COFFEY: Objection.

22 Q. Doctor, can you tell the jury, how do you know myself?

23 A. Through your previous employer.

24 Q. Do you remember the name of the firm?

25 A. Mr. Ripka and Rotter.

899MFROT

Krishna - direct

1 Q. During yesterday's deposition Dr. Davy testified that you  
2 introduced us to each other during a party. Is this correct?

3 A. Yes.

4 Q. And, Doctor, are you being paid for your time in court  
5 today?

6 A. No. Actually, you've been kind enough to donate \$4,000 to  
7 the United Way Heart and Hand for the handicapped children's  
8 fund.

9 Q. Doctor, can you tell us what kind of fund is that?

10 A. It's for orphan handicapped children that are paid for  
11 their medical care and their educational care.

12 Q. Are you basically supporting them?

13 A. No. I have nothing to do with the foundation. It's my  
14 standard and practice not to accept any fees. So I usually  
15 give a choice of three charities that I have donated personally  
16 to, and your office chose this one.

17 MR. PLATTA: Thank you very much, Doctor.

18 THE COURT: Any cross?

19 MR. COFFEY: Yes.

20 CROSS-EXAMINATION

21 BY MR. COFFEY:

22 Q. Doctor, did you say that Ms. Frometa cannot sit for long  
23 periods of time?

24 A. No. Repetitive sitting, standing motions.

25 Q. So she can sit in certain places for periods of time?

899MFROT

Krishna - cross

1 A. She can sit. She just cannot do repetitive bending  
2 pushing, pulling.

3 Q. Now, as we sit here today, what medical records have you  
4 reviewed other than your own?

5 A. I reviewed the procedure notes for the procedure that she  
6 underwent, the MRI reports, and films, the entire life care  
7 plan which was submitted by Mr. Kincaid. Actually, that  
8 include as part of the life care plan our billing records and  
9 all of the other stuff. I just noticed that. And treatments  
10 from therapy and some of the emergency room visit notes.

11 Q. Now, do you have your initial intake form in your chart  
12 there?

13 A. Yes.

14 Q. And what -- could I see it?

15 A. Yes.

16 THE COURT: Mr. Coffey, haven't you seen this before  
17 in discovery?

18 MR. COFFEY: Some of it.

19 THE COURT: It's a yes or no question.

20 MR. COFFEY: No. Not all of it.

21 THE COURT: The intake form that you have asked him to  
22 extricate, the question is whether you have seen that or not  
23 before?

24 MR. COFFEY: No.

25 THE COURT: Why is that not part --

899MFROT

Krishna - cross

1 MR. COFFEY: Some of it is different, your Honor.

2 THE COURT: It's different today than it was at the  
3 deposition?

4 MR. COFFEY: Yes. It's fuller. I just wanted to see  
5 it.

6 BY MR. COFFEY:

7 Q. When you look at the intake form, did Ms. Frometa tell you  
8 about the March 8 collision she had with Kerry Williams in his  
9 Hyundai Sonata?

10 MR. PLATTA: Objection.

11 THE COURT: Overruled.

12 A. No.

13 Q. Now, this collision occurred two days before the diagnostic  
14 films of March 10, isn't that correct?

15 A. That's correct.

16 Q. So now also I want to draw your attention to your last  
17 report which is May 8 of 2008. Do you have a copy of that?

18 A. Yes, sir.

19 Q. Now, you first saw her on August 1 of 2005, is that  
20 correct?

21 A. No. That's a typographical error.

22 Q. You also examined her back in January 10 of 2007?

23 A. No. Those are typographical errors.

24 Q. Who typed it up?

25 A. We have a typist. Those are typographical errors.



899MFROT

Krishna - cross

1 Q. Did you read the report before you prepared it?

2 A. I did. There was a faux pas on my part. It was a  
3 typographical error.

4 Q. If prior motor vehicle accidents are part of the history  
5 here, don't you think that's rather significant that your  
6 records would indicate that you had seen her in 2005 and 2007  
7 before the accident?

8 A. Yeah. I didn't see her then because we have no records of  
9 that. We have no treatment records. It was on that one report  
10 it was a typographical error.

11 Q. You say at some point Ms. Frometa told you she was involved  
12 in motor vehicle accidents?

13 A. Yes. She had mentioned she had had a fender bender which  
14 she found nonconsequential.

15 Q. And she found it to be nonconsequential?

16 A. Yes. She said she had no symptoms from it.

17 Q. But that's based on what she told you, is that correct?

18 A. Yes, sir.

19 Q. And tell me the first time she told you that in your  
20 medical records.

21 A. It was in December of '07.

22 Q. What does the note say, if you could read it to the jury.

23 A. She just told us that there was a fender bender in --  
24 nonconsequential fender bender in May of '07 and July of '07.

25 Q. Now, if there was a March of '07 accident right around the

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Krishna - cross

1 time of the films, couldn't that have also been the cause of  
2 the edema that you were talking about in the MRIs?

3 A. Unlikely because the edema would have been significant in  
4 its impact with regards to pain, clinical findings. It's  
5 unlikely to have been nonconsequential.

6 Q. Now, we talked about -- you talked about in the future you  
7 wanted MRIs for Ms. Frometa. How often were you talking about  
8 MRIs needed to be done?

9 A. These were primarily based on MRIs being done based on her  
10 life expectancy and also based on potential surgical  
11 interventions that would be required. I had suggested that  
12 given her life expectancy and given her potential surgical  
13 procedures, I had suggested that she would need approximately  
14 10 MRIs to the cervical spine and 10 to the lumbar spine, which  
15 would be over a 30-year period, one every three years.

16 Q. Now, Doctor, don't you find it a little unusual that no  
17 subsequent MRIs have been done when every treatment has failed  
18 for Ms. Frometa? Since the March 10 one, all this medical  
19 treatment occurred, there hasn't been one subsequent MRI either  
20 to the cervical area or lumbar area. Isn't that unusual?

21 A. The question is, it's not unusual because we are now at  
22 that point where we are going to look at the next set of  
23 treatments. The last set was just done relatively few months  
24 ago. And the question now we are trying to answer and grapple  
25 with is whether or not she is a candidate for one of several

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Krishna - cross

1 surgical procedures, like fusion, et cetera.

2 Q. Now, the physical therapy that she went to, approximately  
3 how many hundred visits did she have for physical therapy?

4 A. It wasn't hundreds. It was probably less than -- I don't  
5 know the exact number, but I would assume it's for four months,  
6 seven, eight visits a month, so that about 30 visits.

7 Q. The physical therapy center, that's also located in your  
8 office suite, isn't that correct?

9 A. Yes. Part of it is in our office suite and the other part  
10 is in our adjacent building.

11 Q. You own an interest in the physical therapy company, isn't  
12 that correct?

13 A. It's a part of our practice.

14 MR. PLATTA: Objection.

15 Q. So you recommend someone over to your own physical therapy?

16 MR. PLATTA: Objection.

17 THE COURT: Overruled.

18 Q. Did you recommend her to your physical therapy practice?

19 MR. PLATTA: Objection.

20 THE COURT: Overruled.

21 A. Yes. She had therapy in my own practice.

22 Q. When we talk about Dr. Davy, you share space with him in  
23 how many offices?

24 A. He is a tenant in the same buildings that we are in.

25 Q. And you refer over a hundred patients a year to him?

899MFROT

Krishna - cross

1 A. I refer patients to him. We refer many patients to him,  
2 yes. I don't know the exact number.

3 Q. I want you to assume he said it was over a hundred. Would  
4 you disagree with him?

5 A. No, I wouldn't disagree with him.

6 Q. Now, we talk about the Christmas party that you met with  
7 Mr. Platta. Who would come to that party? Do plaintiff  
8 attorneys come to it?

9 MR. PLATTA: Objection.

10 THE COURT: Overruled.

11 A. Our employees. It was an employee party, plus some people  
12 that I know personally for years.

13 Q. Is Mr. Platta an employee or how does he fall --

14 A. No. He just accompanied Mr. Ripka, who was a friend of  
15 mine.

16 Q. You also did work with Napoli Bern & Kaiser, the other firm  
17 that Mr. Platta used to be at?

18 MR. PLATTA: Objection.

19 A. I think Mr. Ripka moved to that form and that's how I know  
20 him.

21 THE COURT: I think that's enough of the inbreeding  
22 subject matter.

23 MR. COFFEY: Yes.

24 Q. Now, are histories important to you, Doctor?

25 A. Histories is important, yes.

899MFROT

Krishna - cross

1 Q. Why is it important?

2 A. Especially it gives us a context as to where the  
3 symptoms -- whether the symptoms are neurological or not  
4 neurological.

5 Q. It can also affect causation, is that correct?

6 A. We are expecting the history to be accurate. It will help  
7 us with the causation, yes.

8 Q. And if you don't have a complete history it could make your  
9 conclusions speculative, isn't that correct?

10 A. Sometimes.

11 Q. Now, do you also have on staff a chiropractor in your  
12 office?

13 A. No. He's a tenant in the same buildings as we are tenants  
14 in.

15 Q. When you say tenant in the same building, that's a building  
16 you own or a company that you have an interest in?

17 MR. PLATTA: Objection.

18 THE COURT: No.

19 You want to withdraw it?

20 MR. COFFEY: I'll withdraw it.

21 THE COURT: If he wants to withdraw his objection.

22 MR. PLATTA: At this point, yes.

23 THE COURT: Put another question.

24 Q. Is that Excel Aire Chiropractic?

25 A. They are in the same building as us in the Bronx.

899MFROT

Krishna - cross

1 Q. You also refer clients to them?

2 A. Yes. Sometimes we do, sometimes they refer us patients  
3 also.

4 Q. Are many of the papers that you share the same records with  
5 your physical therapy center?

6 A. If they are treating patients of ours, they give us copies  
7 of their treatments.

8 Q. Now, in May '08, you were asked to opine in your report  
9 where you proffered an opinion about mental status, is that  
10 correct?

11 A. Yes.

12 Q. And under mental status, the portion of your report that  
13 talks about mental status, there is no mention of anything  
14 other than the mood when the mood was discussed. It said  
15 within normal limits, isn't that correct?

16 A. Yes.

17 Q. That's a little different from your testimony you're giving  
18 here on the stand today, isn't that correct?

19 A. No.

20 Q. And also the sensory exam, you found that to be within  
21 normal limits, is that correct?

22 A. The sensory exam was within normal limits, yes.

23 Q. And motor strength was intact?

24 A. Except for certain muscles.

25 Q. And now, when we talk -- you're talking about other rates.

899MFROT

Krishna - cross

1 You're talking about rates that are charged but not  
2 reimbursement. There is a difference between charges and  
3 reimbursements when you're talking about rates, is that  
4 correct?

5 MR. PLATTA: Objection.

6 THE COURT: Overruled.

7 A. In medicine there is rates that are charged and rates that  
8 are reimbursed for, that's correct.

9 Q. Now, do you believe that the MRI that you reviewed, it did  
10 show degenerative changes?

11 A. Which one?

12 Q. For the lumbar spine.

13 A. There was some degenerative change.

14 Q. And the bone spurring is what shows the preexisting  
15 degenerative change, isn't that correct?

16 A. That's correct.

17 Q. Now, did you ever review Dr. Kaisman's records?

18 A. No.

19 Q. Now, do you agree with the statement that disk bulges can  
20 shrink or go away or become asymptomatic over time?

21 A. It's possible.

22 Q. It is also based upon a study in the Journal of New England  
23 Journal of Medicine. Are you familiar with that study?

24 A. Yes.

25 Q. What do you believe the conclusion of the study was?

899MFROT

Krishna - cross

1 A. I am assuming that you're talking about the July 1994  
2 study.

3 Q. Correct.

4 A. The conclusion of the study was categorical in some facts.  
5 The fact is that that single level; that is, one-level disk  
6 bulges can occur in the normal population and be asymptomatic.  
7 Multiple levels they could not comment on because the study did  
8 not have statistical value to comment on multiple levels like  
9 in this case it's multiple levels. It was also identified that  
10 single-level disk bulges that were asymptomatic can over time  
11 resorb and shrink in size. Unfortunately, that study primarily  
12 was focused on single-level disk bulges.

13 Q. Do you refer a lot of cases to Dr. Babu?

14 A. Some.

15 Q. And is he part of your Manhattan spine surgeon team?

16 A. No.

17 Q. Do you remember being asked at a deposition on May 15,  
18 2008, page 23, line 14:

19 "Q. Do you work a lot with Dr. Babu?

20 "A. He is one of the spine surgeons we use. He is one of the  
21 five or six spine surgeons in Manhattan that we use. We have a  
22 team in the northern Bronx also."

23 Do you recall saying that?

24 A. Yes. We use many spine surgeons, but he's one of them.

25 Q. Then you also on your team have a pain management



899MFROT

Krishna - cross

1 specialist?

2 MR. PLATTA: Objection.

3 A. We have several.

4 Q. And you have a chiropractor?

5 A. We have several chiropractors we refer patients to.

6 Q. And a physical therapy center?

7 A. The physical therapy center is a part of our practice.

8 Q. That's part of the team approach?

9 MR. PLATTA: Objection.

10 THE COURT: Overruled.

11 A. It's a part of being comfortable with physicians who do  
12 good work and are able to treat patients, regardless of their  
13 financial background.

14 Q. But you also all refer cases to each other?

15 A. Actually, Dr. Babu has never referred us a case.

16 Q. Now, do you believe that people can be injured in  
17 low-impact motor vehicle accidents?

18 MR. PLATTA: Objection. He's not an expert.

19 THE COURT: Could you rephrase the question.

20 Q. Is it possible for back injuries to occur in low-impact  
21 motor vehicle accidents?

22 A. I'm sort of not an expert on low-impact motor vehicle  
23 accidents.

24 Q. Did you ever talk to Dr. Babu on why he never performed a  
25 cervical surgery?

899MFROT

Krishna - cross

1 A. I don't remember having that conversation.

2 Q. Now, what part, portions of the spine -- he operates on the  
3 lumbar, the cervical, and the thoracic spine, Dr. Babu, isn't  
4 that correct?

5 A. Yes.

6 Q. And is it fair to say the percutaneous discectomy is a  
7 procedure and not a surgery?

8 A. Yes. All surgical procedures are procedures. Each one has  
9 a slightly different degree of exposure of the spine. The one  
10 that Dr. Babu did was actually opening the spine with a scalpel  
11 and exposing the spine. The one that was done by Dr. Davy was  
12 using a slightly different approach with a tube-like needle  
13 that allows you to shrink the disk.

14 Q. Now, the C3-C4 herniation, that herniation was not  
15 extruding. It was a contained herniation. Isn't that correct?

16 A. That's correct.

17 Q. While you have some familiarity with reading films, you're  
18 not board certified in radiology, is that correct?

19 A. That's correct.

20 Q. Sir, is it fair to say, in your opinion, that a board  
21 certified radiologist is in a better position to interpret  
22 radiological films, MRIs, and x-rays than you are?

23 MR. PLATTA: Objection.

24 THE COURT: I'll overrule it.

25 A. With regards to the spine and brain, because it's a part of

899MFROT

Krishna - cross

1 our board certification process, as a core of competency, I'm  
2 equally capable of reading the spine and the brain. But with  
3 regards to general radiology, such as abdomen and the vascular  
4 of the rest of the body is not a part of my core competency or  
5 my board certification process, so I would not be able to  
6 comment on general radiology.

7 Q. All these procedures, weren't the purposes of them to  
8 reduce pain?

9 A. To reduce pain, to reduce future disability, and to improve  
10 current functional capacity.

11 Q. Now, you did say in your deposition that she had a  
12 permanent partial disability. You didn't opine a full  
13 disability, isn't that correct?

14 A. That's correct.

15 Q. And there is a big difference between the two, isn't there?

16 A. There is a difference insofar as she is able to perform  
17 some activities, but will need assistance with other  
18 activities.

19 Q. When you said earlier about \$18,000 a year for gym  
20 membership, which gym did you talk to that you got those  
21 figures?

22 A. I don't remember who I spoke to, but I think a lot of this  
23 is related to her submitting some documentation on the costs.

24 Q. You had bills for \$18,000 a year for a gym?

25 A. Not bills. These are prospective costs.

899MFROT

Krishna - cross

1 MR. COFFEY: I have no further questions. Thank you.

2 THE COURT: Any brief redirect?

3 MR. PLATTA: Yes, your Honor.

4 REDIRECT EXAMINATION

5 BY MR. PLATTA:

6 Q. Doctor, how many MRIs did you review in your practice so  
7 far?

8 A. I review anywhere from five to ten a day over a period of  
9 at least the last 15 years.

10 Q. Can you estimate?

11 THE COURT: That sounds like a good estimate to me.

12 MR. PLATTA: Thank you.

13 Q. Doctor, how many EMGs did you do until today?

14 A. Thousands, more than 2,000.

15 Q. And, Doctor, when the defense counsel was asking you about  
16 the costs, if there is a difference between the charge and the  
17 refund from the carrier, can you tell me what happens when a  
18 person's policy is exhausted when her carrier doesn't pay for  
19 treatments like in this case?

20 MR. COFFEY: Objection.

21 THE COURT: Sustained.

22 Q. Doctor, were your bills recently paid or they were not  
23 paid?

24 MR. COFFEY: Objection.

25 THE COURT: Sustained.

899MFROT

Krishna - redirect

1 Q. Doctor, can you tell me what kind of refund can you receive  
2 when person doesn't have insurance?

3 MR. COFFEY: Objection.

4 THE COURT: I don't even understand that.

5 Q. Doctor, when a person doesn't have health insurance, how do  
6 they pay you?

7 A. They are personally liable for the bill.

8 THE COURT: I thought you weren't taking money for  
9 bills, but giving it to charity.

10 THE WITNESS: Not me. I'm saying --

11 THE COURT: You're talking about the -- we are really  
12 only interested in you, Doctor. He has got an array of experts  
13 on other areas that he can talk to about other things. Let's  
14 stay with what you know of of your own personal knowledge.

15 Q. Doctor, in other words, in a situation where there was no  
16 more payments --

17 THE COURT: In your practice.

18 Q. In your practice for a patient like Ms. Frometa, actually  
19 in her case, can you tell me what happens?

20 MR. COFFEY: Objection.

21 THE COURT: I'd like to know.

22 A. We personally don't go after the patient. But  
23 traditionally speaking, other physicians who are in our  
24 building do go after the patients.

25 Q. And if the patient doesn't have money, what happens then?

899MFROT

Krishna - redirect

1 A. They are personally liable for collection.

2 THE COURT: A question that's already been asked and  
3 answered.

4 MR. PLATTA: Thank you, your Honor. Thank you,  
5 Doctor.

6 THE COURT: You're excused. Thank you very much.  
7 (Witness excused)

8 THE COURT: What's next?

9 MR. PLATTA: Your Honor, our next witness is  
10 plaintiff, Ms. Adonna Frometa.

11 Your Honor, can we approach first?

12 (Continued on next page)

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Krishna - redirect

1 (At the side bar)

2 MR. PLATTA: Your Honor, my client just asked me --

3 THE COURT: I can't hear you.

4 MR. PLATTA: My client asked me if she can use the  
5 rest room before she testifies.

6 THE COURT: You have to come up here for that.

7 MR. PLATTA: I apologize.

8 (Continued on next page)

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899MFROT

Krishna - redirect

1 (In open court)

2 THE COURT: We will take a five-minute recess.

3 (Recess)

4 THE COURT: I heard something on the way out about  
5 objections. I haven't said anything because we are a  
6 reasonably relaxed group here. If you don't stand, not so much  
7 for me, but because the reporter won't get it, the witness  
8 won't know what to do, not that they often do, but indeed it  
9 will make things a lot easier and it's also appropriate. I  
10 don't know what it's like across the street, having not been  
11 there for about 15 years, but I can tell you what it's like  
12 here, and lawyers rise to make objections, not just because  
13 it's courteous, but so everybody knows what they are doing.  
14 When you whisper under your breath, objection, any of you, the  
15 likelihood is that none of us are going to hear us.

16 (Jury present)

17 ADONNA FROMETA,

18 called as a witness by the Plaintiff,

19 having been duly sworn, testified as follows:

20 DIRECT EXAMINATION

21 BY MR. PLATTA:

22 Q. Good morning, Ms. Frometa.

23 A. Good morning.

24 Q. Ms. Frometa, can you please tell us your address right now?

25 A. Yes. I live now with my aunt at 48 -- 448 Meadow Avenue in



899MFROT

Frometa - direct

1 Brooklyn between Washington and Tillary Street.

2 Q. How long do you reside at this address?

3 A. Probably since the first lower back surgery from Dr. Babu.

4 Q. And where did you live before?

5 A. With my mom at 233rd Street in the Bronx between 87 and  
6 there is a number 4 train around there.

7 Q. How long do you reside at that prior address?

8 A. At my mom. About four years.

9 Q. Can you tell me where did you live before?

10 A. Yes. Besides New York, I moved into Dallas, Texas for  
11 probably ten months. Then I moved -- that was before September  
12 11, so I moved to Dallas, Texas. Then I moved to Las Vegas.  
13 Then I got stuck there because I wanted to move back to New  
14 York and because of what happened I had to stay out there. And  
15 then --

16 Q. You mean September 11?

17 A. Yes. I stay stuck over there. I didn't come back here  
18 because I stayed for about three and a half years. Then I  
19 moved to Boston, Massachusetts, and then I moved back to New  
20 York.

21 Q. Can you tell us something about your education, all your  
22 basic schooling?

23 A. When I -- I went to fifth grade here in New York, Brooklyn.  
24 P.S. 108, and it's by Ashford Street and the J train and it's  
25 about ten minutes away from the JFK Airport. Then I went to

899MFROT

Frometa - direct

1 Martha Valley Junior High School by Delancey Street and Vesey  
2 Street and I think the J train pass around there, too. Also I  
3 went to John Jay High School on Seventh Avenue in Brooklyn and  
4 it's supposed to be a law school for high school. And the G  
5 train pass around there. Then I went to Kingsborough College,  
6 and I did not complete it, the Kingsborough College. I didn't  
7 do the year. And that's my education.

8 Q. Ms. Frometa, were you involved in the accident, motor  
9 vehicle accident, on February 14 of 2007?

10 A. Yes. I was in the red light and something hit me really  
11 hard. It felt like an atomic bomb.

12 Q. By red light, meaning you were stopped in the red light?

13 A. I was in the red light and something hit me. I didn't know  
14 what. It hit me twice, and then I blacked out. It hit me like  
15 an atomic bomb.

16 Q. For how long did you black out?

17 A. I have no idea. Maybe a few minutes, two, three. I am not  
18 sure.

19 Q. Ms. Frometa, I am going to show you some photographs. You  
20 will see them on your screen. Can you tell me if you recognize  
21 your car after the accident on this picture?

22 A. No. It says 4 Runner.

23 Q. Is this your vehicle?

24 A. Yes, that's my vehicle.

25 Q. What about on this picture?

899MFROT

Frometa - direct

1 A. Yes, that is my vehicle.

2 Q. Does it show the damage to your vehicle as a result of this  
3 accident?

4 A. Yes, that is very damaged.

5 Q. What about this one?

6 A. Yes, that is very damaged.

7 THE COURT: That's your car is what he's asking you?

8 THE WITNESS: That is my car. Sorry, sir.

9 Q. What about that one?

10 A. Yes, that is my car.

11 Q. Ms. Frometa, can you tell me what kind of treatment did you  
12 undergo as a result of this accident? Basically, was there  
13 ambulance, for example, at the scene?

14 A. When I woke up from the blackout, I called the 911, and,  
15 yes, the ambulance came within about maybe ten minutes together  
16 with the police. I don't know who got there first. And the  
17 two ladies helped me to get out of my vehicle to place me  
18 inside of the ambulance. Right before I went in the ambulance  
19 I took a look very quickly and I noticed a huge dark truck that  
20 I realized that's what probably hit me. It had hit me. And  
21 then they put me inside of the ambulance and they strapped me  
22 on the stretcher.

23 Q. And where did they take you to?

24 A. They took me to Cabrini Hospital on 19th Street between  
25 First and Second.

899MFROT

Frometa - direct

1 Q. Can you tell me what was done for you at Cabrini Medical  
2 Center?

3 A. They got me out of the stretcher, they put me in a  
4 wheelchair, and they took me to the CAT scan, the CAT scan,  
5 where they do the CAT scan, and they left me in there and they  
6 did whatever they had to do, and then they placed me again in a  
7 wheelchair and they put me in another waiting area while I was  
8 waiting for whatever the result was. And the doctor came back  
9 and he said that I have lower back and neck injuries and that  
10 my spinal cord was no longer in the center. It was off. That  
11 will bring me problem in the near future. But I have to come  
12 back and follow up. I also have to find another doctor for  
13 this type of treatment, that he might be able to tell me the  
14 future what might be going on or -- I might be going on foot  
15 treatment after two months or three months, or I might not need  
16 I, but it looks bad, he said.

17 Q. Ms. Frometa, let's step back for a moment to the moment of  
18 impact. Can you describe for us the force of impact? Was it  
19 hard, medium, heavy, or something else?

20 A. I cannot tell. It was so hard it felt like an atomic bomb.

21 THE COURT: That's the third time we understood it was  
22 an atomic explosion.

23 THE WITNESS: I'm very sorry.

24 THE COURT: It's not your fault. It's his fault.

25 MR. PLATTA: I apologize, your Honor.

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Frometa - direct

1 Q. Ms. Frometa, once you left the Cabrini Medical Center, what  
2 was the next treatment that you received? Where did you go to?

3 A. Nine days after I went to Dr. Villafuerte on 43rd Street  
4 between Madison and Park.

5 Q. What kind of treatment did you receive from  
6 Dr. Villafuerte?

7 A. Dr. Villafuerte just recommended me to see him -- to take  
8 therapy five days a week for five weeks on therapy and he said  
9 to visit him once a week for five weeks.

10 Q. Did you do that?

11 A. Yes. He also told me he was not going to be able to tell  
12 me anything until he received the MRIs and the X-ray because  
13 after that he would be able to know what's going to be with me.  
14 In the meantime, just follow the therapy and try to keep a  
15 normal life but diminish any lifting on too much work. I can  
16 go to work, but work less, less hours and less days.

17 Q. Can you tell me how many jobs did you have soon after the  
18 accident?

19 A. They call me from the Excel Aire, or the private elite  
20 aircraft, their elite flights. I applied for 30 of them for a  
21 couple or two years, and they finally call me two days after  
22 the accident. I was so so happy and I just went over there, I  
23 try my best and I said, I don't have to go dancing anymore and  
24 I go, they are going to like me, and sure enough I apply with  
25 them and she try me for a week and she say you are going to go

899MFROT

Frometa - direct

1 full time as a flight attendant.

2 Now, I want you to take your license, it's in New  
3 Jersey, and come back, it's a seven-day training. They can  
4 only hire private flight attendant for that. We already work  
5 for a larger commuter aircraft. That's the only way they can  
6 hire for elite aircraft. And the only problem with that  
7 training is, we do the fire department training. It's like  
8 being a fire fighter. We do the paramedic training. I know  
9 how to use all the CPRs and they teach us, if a lady is giving  
10 birth after six months, with a cord around the neck and -- they  
11 teach us how to be basically a nurse. And it's a basic  
12 training, also how to be a firefighter and a nurse and a  
13 waitress in the sky.

14 But the most important thing about this training is  
15 not about the food. It's about saving the passengers, saving  
16 the passengers. It requires to be able to lift an 80-pound  
17 raft that we have inside of the aircraft, not the one that they  
18 are attached on the door. Those are already attached, which  
19 the door is very heavy to manipulate, but we have to be in  
20 excellent physical condition to do that. I can no longer pass  
21 that part of the training. I can pass anything else, but the  
22 most important is the safety of the passengers in case of  
23 unplanned landing or crash and hopefully we all safe. Then I  
24 will be able to bring the raft that is 85 pounds which I cannot  
25 no longer carry that. We have to pull it. We have 30 seconds

899MFROT

Frometa - direct

1 for that. We attach it to the door. If the door is jammed, I  
2 take it to the near exit window and I just attach it and make  
3 sure that doesn't float away. And I pull the red tag and I  
4 come back and do the evacuation.

5 I no longer have the strength. My spinal cord  
6 injuries on my neck and my lower back will not allow me to pull  
7 an 85-pound raft to save the passengers. My carrier flight  
8 attendant career is out of the window for that. And that is my  
9 passion and that's what I always wanted to do that before and I  
10 have done that before at the MGM and Bellagio in Las Vegas. I  
11 used to work for them.

12 Q. What kind of airline did you work before for?

13 A. I also worked for American Transair and at that time they  
14 needed only for the summertime flight attendant. After that,  
15 they lay off the people. Some of them got called back. They  
16 never called me back. I also worked for private jet, but it  
17 was not private. It was a commuter airline. I was much  
18 younger then. That only lasted six months. The company went  
19 out of business. That was a lot of fun and it was really nice.  
20 I really enjoyed it.

21 Q. Ms. Frometa, can you tell us, did you do any acrobatics  
22 before the accident?

23 A. I have always been very athletic. My mom -- I figure skate  
24 since I was 14 years old on ice, I'm level 6 on ice skates  
25 which in a level 4 you're already pretty good to skate with a

899MFROT

Frometa - direct

1 lot of experts on ten skaters or 15 on the ice, and we are  
2 allowed to stay for an hour or hour and a half. I'm on that  
3 level. I can do -- I can do back flip and spins and jumps, and  
4 I really love ice skating and I use my ice skates that I use,  
5 they are olympic skates. I can't skate with anything else. I  
6 haven't been skating since the accident, since the surgery. I  
7 cannot.

8 Also, I've been skiing for 15 years. I'm an excellent  
9 skier, actually. I go out west or wherever they have snow. I  
10 bring my goggles and my helmet and it's wonderful. I ski 15  
11 days to 40 days a year. I get the cheapest whatever so I can  
12 stay longer in the mountains. It's beautiful. And it requires  
13 the physical strength that it requires for any of the sports is  
14 to have a perfect condition -- when we are tired, we are tired.  
15 But we are injured, we are injured. When I'm skiing, I don't  
16 ski the baby slope, which is pink, green. The blue is okay,  
17 but I go on the single black and which is very nice and smooth,  
18 no bumps. It is wonderful. I can no longer go skiing, half an  
19 hour. You stay for four, five, six hours or more.

20 To stop, go sideways, you bring your hips to one side  
21 and the shoulder to the other side, that's going to injure my  
22 spinal cord and my neck and my lower back. The same with the  
23 skating. The jumps and the flips and the spins. The problems  
24 I have since this accident -- this is fine. But if I look down  
25 for about three minutes or five and I go back up, everything



899MFROT

Frometa - direct

1 spins a thousand miles an hour. So I cannot actually do my  
2 spins on my ice skates anymore.

3 I did gymnastics for a while, probably almost 15 years  
4 growing up. And that is wonderful, too. I'm very athletic.  
5 I'm not a lazy person. I'm a workaholic. I play tennis and I  
6 play racquetball. But those sports require a lot of strength  
7 from the body, to jump, to keep the ball, to squat. Most of  
8 the people you have to squat down. I can't go on my bike  
9 anymore, which I don't have it anymore because it requires to  
10 stay a period of time leaning forward and your head up. I'm  
11 not a lazy person. I don't want to be a burden to the  
12 community. I look, I try to do my best.

13 I work, either dancing -- the place is legal. It's  
14 legal by the government. It's like a McDonald's. It's like  
15 anyplace else. It's legal for the place to be there and it's  
16 legal for whoever have to be 21 years old, have paper to work  
17 there, and it's a wonderful place. The management, they are  
18 very professional. They look at us straight in the eyes to  
19 management --

20 THE COURT: Why don't you let him ask some questions  
21 just for the change of pace.

22 Q. Ms. Frometa, going back to your treatment for a moment, can  
23 you tell me where else did you go beside Dr. Villafuerte?

24 A. Besides Dr. Villafuerte. After that, I went to Dr. Kaisman  
25 on 51 25th Street, and I saw Dr. Kaisman and I gave him the

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Frometa - direct

1 MRIs and CAT scan and films. And he told me -- there were two  
2 visits and he told me I needed a steroid injection in my neck  
3 and I may need one section or one section might just work.  
4 Because we don't know, we are just going to give it a try. We  
5 did -- I'm sorry. I didn't do any with them. When I went for  
6 the treatment with him, I went out when I saw the needle, I  
7 just run out. I cannot do it. Now, he did told me, you don't  
8 have to do this. You read the pamphlet, read what's going to  
9 happen and everything, you think about it. It's your decision.  
10 If you don't do it, you are going to keep having tingling and  
11 numbness.

12 THE COURT: You don't mean section. You mean  
13 injection?

14 THE WITNESS: Injection, yes, your Honor.

15 Q. Ms. Frometa, did you go to any other doctor beside Dr.  
16 Kaisman?

17 A. Yes. He recommended me to Dr. Babu, which at the time  
18 there they were -- Dr. Babu had an office in the same building  
19 or the same floor. I didn't see them together at the same  
20 time, but they were in the same building. And I showed Dr.  
21 Babu the films. And Babu looked at the films and he told me --

22 MR. COFFEY: Objection.

23 THE COURT: Sustained.

24 Let your lawyer ask you questions. If you can answer  
25 them a little more directly, that will also be helpful.

899MFROT

Frometa - direct

1 THE WITNESS: Okay. And slower. I think the  
2 reporter --

3 Q. Ms. Frometa, what was your understanding of what Dr. Babu  
4 told you?

5 A. My understanding with Dr. Babu was that he looked at the  
6 film and the X-ray and he read whatever was in the paper. And  
7 he said, I cannot --

8 MR. COFFEY: Objection.

9 THE COURT: Sustained.

10 Q. Ms. Frometa, did Dr. Babu tell you that you need surgery?

11 A. Yes, he did. He told me I needed surgery, but it will be  
12 my decision to make that decision because if I don't do the  
13 surgery then I will have like no leg. But I will be feeling  
14 tingling, some numbness. Already it was very -- it was  
15 tingling and numbness. I still took the pamphlet and I read it  
16 and I was thinking about it. It took me about a couple of  
17 months before I made the decision when I felt that my leg  
18 was -- literally was like, it was not there. I didn't feel my  
19 leg. For about ten minutes up to about 40 minutes, up to an  
20 hour I will not feel my leg. I will have to hop on my right  
21 leg to do things. I will not go out of the house.

22 Q. Ms. Frometa, in the days when you were able to work, did  
23 you work after the accident?

24 A. Honestly, yes, I did, because at Cabrini the doctor said,  
25 just do things less and you can work, but just don't lift

899MFROT

Frometa - direct

1 anything. If you're working -- I told him that I dance. He  
2 said, just dance less or pretty much everything. Wait until  
3 you get the next whatever the doctor is going to tell you,  
4 whoever you are going to go to, and then follow his  
5 instruction. Yes, I did go to work. I went to work a little  
6 over two months, but I didn't work the entire two months. I  
7 work a total of 20 days in the period of two months and that  
8 was including dancing at the club, waitressing, and flight  
9 attendant, whenever they needed me for a flight.

10 With the flight we don't carry luggage. The pilots  
11 take care of that because different elite aircraft. They close  
12 the door and they open the door and we don't have a cart. It's  
13 only 14 passengers. And I carry the food with the tray one by  
14 one and place it on their table, and the plate is different. I  
15 just bring it over. It's nothing like pushing anything heavy.  
16 It's a light work.

17 Q. And you were working for this airline after the accident up  
18 until the time that you had to undergo this test, safety test,  
19 with airlines?

20 A. Yes.

21 Q. After unsuccessful attempt to this test did you go back to  
22 working as a flight attendant?

23 A. No. Because I didn't go back to work as a flight attendant  
24 or go dancing.

25 Q. When you said almost two months, how many days,

899MFROT

Frometa - direct

1 approximately, did you work after the accident for the club?

2 A. Probably, around 20 days in a period of two months.

3 Q. That would be around a month still working after the  
4 accident?

5 A. Yes. If they have a first job and they go dancing, that  
6 will be their second job because they want to pay bills or  
7 whatever, and that's okay. A lot of entertainers, they have  
8 first one job and there will be a second job where they can go  
9 one day, two days a week or three days a week.

10 MR. COFFEY: Objection.

11 THE COURT: I'll allow it.

12 Q. Ms. Frometa, where did you work before besides being a  
13 flight attendant and dancer?

14 A. I work as in an optical store on 14th Street between  
15 Seventh and Eighth four years. That was, I think, '88. And I  
16 was there for four years. They went out of business and then I  
17 worked for another optical store as a salesperson of eyeglasses  
18 and contact lenses for Economy Best Vision between Seventh  
19 Avenue -- between Seventh and Eighth. They are still there.  
20 And I also worked as -- part-time, I helped my friend at the  
21 bookstore, which it was next door from the optical store. And  
22 his wife is a psychiatrist and he's a salesperson. He owns a  
23 bookstore, not any longer. It went out of business. I used to  
24 babysit his kids. I've taken them ice skating and wherever  
25 they wanted to go. They used to pay me something. I learned

899MFROT

Frometa - direct

1 the business on the bookstore. I know how to run the business  
2 on the bookstore.

3 Q. Were you able to do that after the accident?

4 A. Yes, I did went and helped out, but it was nothing lifting.  
5 I help them to order books or take the money to the bank, or  
6 just keep the books in place or put the price tags in the  
7 books. And that was okay. That was fun.

8 Q. Ms. Frometa, were you able to -- I'll withdraw this  
9 question.

10 Ms. Frometa, did you also see Dr. Davy as your  
11 physician?

12 A. Yes. He's a pain management and he also -- I saw him. And  
13 he reviewed the papers. And when I met him he said, look --

14 MR. COFFEY: Objection.

15 THE COURT: Listen to the question and just answer.  
16 All he asked is whether or not you met Dr. Davy. You don't  
17 really need volume.

18 THE WITNESS: I'm sorry, your Honor.

19 THE COURT: Don't be sorry. Just listen. You can  
20 tell us whatever your story is, but do it the right way. And  
21 you can't tell us what other people said because that's really  
22 not evidentiary, allowable.

23 Q. Ms. Frometa, I'm only asking about your understanding of  
24 what was going on. You cannot, as the judge told you, talk  
25 about anything else.

899MFROT

Frometa - direct

1 Ms. Frometa, what did you complain to Dr. Davy about?

2 A. I complained to him about neck and lower back pain.

3 Q. And what was the course of treatment that you had with his  
4 office? What did he do for you?

5 A. He did a steroid injection first. And if that did not work  
6 we did another steroid injection. It's a total of amount of  
7 section for that. After that, it might work. And if that  
8 didn't work, which I will know, he told me I will feel that all  
9 the pain came back, tinglings and numbness on my arms from my  
10 neck. He said, we will have to do the compression of the disk,  
11 but we will not able to do both sides at the same time because  
12 that's not the way to do it. We have to do first the right  
13 side, and we did. It worked. But once the body is injured  
14 it's never the same. So when -- we are scheduled for the left  
15 side, he said, you have to come over to the office. We never  
16 did the left side. There is an obstruction obstructing the  
17 left side which if he tries to operate on the left side he will  
18 leave me paralyzed from the neck down. He said --

19 THE COURT: You don't want to tell us that. What  
20 happened next might be a better way to frame questions.

21 Q. Ms. Frometa, when you mentioned steroid injection, was it  
22 the first steroid injection that you received to your cervical  
23 spine in April of last year?

24 A. Yes.

25 Q. Was the needle inserted into your neck?

899MFROT

Frometa - direct

1 A. Yes.

2 Q. Following that procedure did you also have what was called  
3 a percutaneous discectomy done by Dr. Davy?

4 A. Yes.

5 Q. You can see that on the screen right now. Was it done in  
6 December of last year?

7 A. That was in December, correct.

8 Q. Do you remember this procedure?

9 A. Yes. Well, I was awake, but when I was asleep I don't  
10 remember.

11 Q. When you woke up did you have any pain?

12 A. A lot of pain, very uncomfortable.

13 Q. And did the doctor describe for you what's going to happen  
14 to you, that he's going to put a needle inside your throat and  
15 go to your neck?

16 A. He did. He described the whole surgery, he described it.  
17 I didn't jump into the decision right away. Before doing that,  
18 it took me a couple of months before doing that surgery.

19 Q. After the steroid injection did your pain decrease, the  
20 steroid injection to your neck?

21 A. The steroid injection?

22 Q. Yes.

23 A. The first one he did, they didn't work. That's why he did  
24 the compression of the disk.

25 THE COURT: He asked you about the third one?



899MFROT

Frometa - direct

1 THE WITNESS: The third one. None of them work. I'm  
2 sorry. None of them work.

3 Q. Ms. Frometa, do you remember when you saw Dr. Babu and he  
4 recommended surgery, do you remember what did he tell you, what  
5 kind of surgery he's going to do?

6 MR. COFFEY: Objection.

7 A. I'm sorry.

8 MR. PLATTA: I'll rephrase the question.

9 THE COURT: Why don't you do that.

10 Q. Ms. Frometa, what was your understanding of Dr. Babu's  
11 surgery? Did you understand that he's going to cut you open in  
12 your back?

13 A. Yes. And that will be for my legs so I can feel it, at  
14 least, and, yes, I feel my leg back, but I still have tinglings  
15 and pain. My leg never left me again. I have my leg. I can  
16 feel it. But the tinglings and numbness, a little numbness and  
17 tinglings and pain is still there. It does not go away.

18 Q. And, Ms. Frometa, do you have a scar as a result of this  
19 procedure on your back?

20 A. Yes, I do.

21 Q. How long is the scar?

22 A. It's about this long.

23 Q. Is it something very visible?

24 A. It's too big because I don't have -- I don't like that.  
25 That's a big scar.

899MFROT

Frometa - direct

1 THE COURT: Let the record indicates it looks to me  
2 about two inches. Is that what you would guess?

3 THE WITNESS: I would say two inches, yes, your Honor.

4 Q. Ms. Frometa, how did you feel after Dr. Babu's surgery?  
5 Did it improve your condition, make it worse, stay the same?  
6 What happened?

7 A. They -- it did improve up to a point because I could feel  
8 my leg. My leg never left me again. I still feel tinglings  
9 and still bothers me, especially with the weather condition  
10 when it changes very much. It's just the pain is there always.  
11 At least I feel my leg. I'm glad I feel it.

12 Q. Did you also have lumbar steroid injection done to your  
13 lower back following this surgery when you not have much  
14 improvement in your pain?

15 A. I did not. I did not. It helped a little bit. Like I  
16 said, everything helped a little bit, but it's not perfect.

17 Q. And is this the steroid injection that you had when they  
18 placed you on a table and they inserted the needle again into  
19 on your back?

20 A. Yes.

21 Q. Do you remember the procedure?

22 A. Yes. It lasted about 40 minutes. And they injected also,  
23 they put -- they injected something on my spinal cord which I  
24 have to do every year and a half or every two years for the  
25 rest of my life.

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Frometa - direct

1           The reason why I'm sitting straight like this right  
2   now is because I was already bending forward walking in a  
3   position, bending forward, and that procedure helped me to stay  
4   straight like this. And that only lasts a year and a half up  
5   to two years. Once that wears off, I have to go back and do it  
6   again and it's a very expensive surgery.

7   Q. And, Ms. Frometa, can you tell me if Dr. Babu recommended  
8   to you that you have a spinal neurostimulator implanted into  
9   your back and into your neck?

10           MR. COFFEY: Objection.

11           THE COURT: We will allow it. We are not asking about  
12   whether you did it or didn't do it. You're just being asked  
13   whether you recall having that suggestion made to you.

14           THE WITNESS: Yes, I did recall they suggested it. I  
15   thought about it. I didn't jump into the decision right away.  
16   Yes, we did the procedure, and, again, for me it did not work.  
17   Not everything works for everybody.

18   Q. How did you feel when you had this implant in your body?

19   A. I felt more pain. It did not help me. I felt more pain.

20   Q. We are talking about the lower back, right?

21   A. The lower back and the one in the upper.

22   Q. Did you have to have the implant removed at some point?

23   A. Only after seven days they have to remove it. The other  
24   one, the one they put a little higher, I have it removed  
25   because it bothered me too much. After four days I have to

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Frometa - direct

1 check myself into a hospital if you guys don't take this one  
2 out. It's too painful.

3 Q. Basically, you have to have two procedures, you had two  
4 procedures each time you had an implant done?

5 A. Yes.

6 Q. Was it painful?

7 A. Very, extremely painful. I don't wish this to anybody  
8 here, nobody.

9 Q. And, Ms. Frometa, can you tell me if you had any physical  
10 therapy with Dr. Krishna's office?

11 A. At Dr. Krishna's office, yes. I did -- at first the other  
12 one I finished my five weeks, like they say, and Dr. Krishna I  
13 followed for almost a year or a year of therapy three days a  
14 week, two or three days a week, like they recommended, but I  
15 tried to go at least the three days a week every time. And he  
16 helped for the therapy, but, again, the next day I was back to  
17 square one.

18 Q. Did you have to pay for the treatment that you received?

19 A. No. The insurance at the time was -- the insurance people  
20 were taking care of the treatment and everything. But now I am  
21 exhaust -- I exhausted the \$50,000 --

22 MR. COFFEY: Objection.

23 THE COURT: Sustained. Don't answer. Do you  
24 understand my job?

25 THE WITNESS: I'm sorry, your Honor.

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Frometa - direct

1 THE COURT: What do you think it is?

2 THE WITNESS: You are the one that makes the decision  
3 here, your Honor, in court.

4 THE COURT: As to whether or not the question is  
5 objectionable, I can rule either to sustain the objection or  
6 overrule it. If you keep on talking before I make my ruling,  
7 it's quite complicated for either the jury or the reporter to  
8 get it and, in fact, it may be something I sustain in the way  
9 of an objection and then you shouldn't answer it at all. So  
10 when you hear an objection, hopefully when the defendant rises  
11 to provide it so we hear it, just wait until I rule on that  
12 objection before you answer.

13 THE WITNESS: I understand, your Honor.

14 Q. Ms. Frometa, who pays for your treatment right now?

15 A. Nobody. I have no insurance and nothing to pay for my  
16 treatment. I'm already due for my steroid injections and soon  
17 I have to do the one for the spinal cord where that is very  
18 expensive, and that's what keeps me standing up. At least I  
19 try to do things halfway, normal of the way I used to do in the  
20 past.

21 Q. Do you actually get treatments once the payment is stopped?

22 A. They don't pay anymore. They stopped.

23 MR. COFFEY: Objection.

24 THE COURT: Sustained.

25 Q. Ms. Frometa, when you mentioned before that you were living

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Frometa - direct

1 with your mom, who was there living with you guys?

2 A. That was -- that's my mom, Nadia, she is 60, and my sister,  
3 Annie, she is a year younger than me, and my nephew, Albert,  
4 now he's 16 years old, and then my mom asked me to move in with  
5 her, and at the time I used to live in Brooklyn by Ocean  
6 Parkway, near Coney Island with my other aunt, she just passed  
7 away a couple of months ago, and I move in with my mom.

8 Q. What was the reason for you moving with your mom?

9 A. Because she needed help with basically with food and all  
10 the things in the house and whatever we might need.

11 Q. Ms. Frometa, what was the reason -- I assume that you moved  
12 in before the accident, right?

13 A. Yes. I live with my mom before the accident.

14 Q. What was the reason for you to move out?

15 A. Because it was closer. My other aunt Eva, she is younger  
16 than my mom and she had the energy to take care of me after,  
17 for the surgeries, especially the one that Dr. Babu did for the  
18 lower back. My aunt had to take care of me, and she had more  
19 energy than my mom. She cleaned me up. It was very -- it was  
20 like going back to being a kid, a baby, and she washed my  
21 clothes, she did everything for me, she feed me, she just took  
22 care of me like back to when I was one years old.

23 Q. Ms. Frometa, are you a United States citizen?

24 A. Yes, I am.

25 Q. Ms. Frometa, can you tell me what other treatment that you

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Frometa - direct

1 received from the Dr. Krishna's office beside physical therapy?

2 A. He prescribed me some -- if I tell him I have pain, he will  
3 prescribe me medication for my pain. Also, he told me to keep  
4 following the physical therapies, and he recommended me to Dr.  
5 Davy for the pain management, neck and back.

6 Q. Before you had the implant of the trial neurostimulator,  
7 did you see any other doctor referred by Dr. Davy?

8 A. I'm sorry?

9 Q. Were you referred to any other physician by Dr. Davy before  
10 you had the neurostimulator implant?

11 A. Before the stimulator implant.

12 Q. Did you see any psychologists as a result?

13 A. Yes, I did.

14 Q. Where was it?

15 A. That was in New Jersey.

16 Q. And what was the reason for you to see him?

17 A. Because I had been very stressful. This is not the way I  
18 live my life. Just standing still doing nothing and I get  
19 anxiety and nervousness. I want to know when I am going to go  
20 back to whatever -- at least my normal life will be. I cry a  
21 lot and I'm not the same.

22 Q. Ms. Frometa, do you remember Dr. Krishna doing a test, a  
23 nerve test, at his office for you?

24 A. Yes. It's very painful. They just kind of stick things,  
25 like bubble gum with a piece of wire where they can find the

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Frometa - direct

1 nerves or whatever might be missing. They electrocute me and  
2 it's very painful. I scream or just jump. And then he also  
3 place a needle right here with a long wire and that is also  
4 very painful. He place it here on my leg and I don't like it  
5 but that's the only way they are able to find out where the  
6 pain is coming from or where the -- they might be able to do  
7 surgery for.

8 Q. Ms. Frometa, did you have any prior accidents prior to  
9 February 14 of 2007?

10 A. In the past in L.A., I was driving my Jeep with my mom and  
11 nephew --

12 THE COURT: It's a yes or no question.

13 A. Yes, I did.

14 Q. Do you remember having one in Los Angeles in 2001?

15 A. In 2001, yes. September 4, 2001.

16 Q. Did you go seek any medical treatment for that accident?

17 A. No, not for me, not for my mom, not for no one.

18 Q. Do you remember having another accident in '04?

19 A. '04?

20 Q. Yes.

21 A. No.

22 Q. Can you tell me if you had any other accidents between 2001  
23 and 2007 for this accident that we are here for today?

24 A. Yes. In 2004, there was five cars, we standing in the red  
25 light, and I was somewhere in the middle, and a taxi driver



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Frometa - direct

1 just bump into everybody and everybody just went bumper to  
2 bumper and no one got hurt. It's just a bumper to bumper  
3 thing. Nothing happened.

4 Q. Did you seek any medical treatment for this accident?

5 A. No.

6 Q. Did you bring a lawsuit as a result of this accident?

7 A. Not at all. Why would I waste my time on little things  
8 like that.

9 Q. Ms. Frometa, the accident in Los Angeles, can you tell my a  
10 little bit more what happened there?

11 A. Yes. It was past 12 and I'm driving and there is people  
12 there are driving pretty fast and I have to follow with the  
13 same speed as everyone else is. At one point the car in front  
14 of me just stooped too quickly. And I jam on the brake and I  
15 feel so bad for this oriental old gentleman. I hit him and his  
16 car was a little dent and I told him to please not get out of  
17 the car, it's not good. You don't know what's wrong with you.  
18 Stay in your car. I did not get out of my car. We waited for  
19 the police and the police was there pretty soon. They pull us  
20 to the side, we were there for about an hour and a half. I saw  
21 a lot of ambulance and police and whatever, but it was mainly  
22 for the old oriental gentleman. I felt really bad.

23 Q. This was approximately seven years -- six years prior to  
24 the accident?

25 A. Yes.

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Frometa - direct

1 Q. During this six years, did you feel any kind of discomfort  
2 to your neck or back?

3 A. Not at all, not at all. Not from this.

4 Q. How about after the accident? What about the accident in  
5 '04, did you have any kind of discomfort to your neck or back?

6 A. Not at all, never, never.

7 Q. Ma'am, did you have any subsequent accidents following this  
8 accident, any fender bender, anything at all?

9 A. Yes. I was actually coming out of a diner in New Jersey,  
10 and I looked back and I go slow and, suddenly, large SUV, the  
11 cover -- it took the cover of my back light on the car and that  
12 was it. So I stopped the car, we both got out, and I noticed  
13 they were throwing some beer bottles over a fence or something.  
14 I don't know what it was.

15 Q. Did you get injured?

16 A. I did not. And the police came over and he said, your car  
17 is good, your car is good, you can go home. Here is my card,  
18 you can report it. If you do, you want to report it, fine, but  
19 you don't have to. Both of your cars are okay. You can drive  
20 it.

21 Q. Did you bring a lawsuit as a result of this accident?

22 A. No.

23 Q. Did you go to the emergency room?

24 A. Not at all.

25 Q. Did you have any other fender benders?

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Frometa - direct

1 A. I believe there was one. They said March 8, which I don't  
2 recall that, but I guess I have to say yes. And I say I did,  
3 but I was not in the car. I was not in the car. The car was  
4 parked and I went back the next day and the car was hit. I  
5 don't know whether it got hit by a car, got a truck, by a  
6 bicycle. I don't know.

7 Q. Did you report it to your carrier?

8 A. I did. I did report that the car I had, the Sonata,  
9 whatever, it has a dent and it has to be fixed.

10 Q. Did you bring a lawsuit against anyone?

11 A. Not at all.

12 Q. And did you have any other accidents?

13 A. That I remember, no.

14 Q. And was there a situation once when there was a car rental  
15 from car rental company that you were driving and following  
16 that time there was an allegation there was a scratch or some  
17 damage to the car?

18 A. When I rented the car, the car rental, the only car they  
19 had left when I went to pick it up, he said, this is the only  
20 car left. It's pretty damaged. We are aware of the damages,  
21 don't worry, you can take it. When I turned it back, which was  
22 March 5 or March 8, he said, you damaged the car, you crashed  
23 it, I'm sorry, and he said, well, this car was not like this.  
24 I said, this is the only car was left and you told me it was  
25 okay. I don't work in a car rental. I don't know how they do

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Frometa - direct

1 things. When I returned the car the only one -- he claimed I  
2 damage it. I guess I damage it, I damage it then.

3 Q. Ms. Frometa, can you tell me something about your regular  
4 daily life. Can you tell us what are the things that you can  
5 no longer do?

6 A. I can no longer brush my teeth normally as I used to. I  
7 cannot bend my body forward. I have to use a cup and stay like  
8 this and brush my teeth. And I will spit back in the cup and  
9 put it. I cannot put on my clothes normally like I used to. I  
10 have to be against the wall. If I were going to wear  
11 stockings, I would be laying down on my leg and I would bring  
12 one leg over and the other one. I put on my clothes. And  
13 whenever I need help, like the dress I have now, my aunt, even  
14 though I am up against the wall, I put my clothes on, then my  
15 aunt will put the zipper up.

16 Also, I cannot bend all the way forward to touch the  
17 floor. I cannot go all the way on -- my sports, ice skating or  
18 tennis or swimming, because it requires too much of the back  
19 and forth. I can no longer be sitting like this for a long  
20 time because it's hurting me. You have to because I'm here.  
21 Also, it's difficult for me to go to sleep also. I have to put  
22 a pillow on my back facing back. I cannot do grocery shopping  
23 like I used to in the past where I can carry a nice amount, but  
24 not too heavy. I can probably carry no more than five pounds  
25 per hand or 12 pounds per hand, but that's it. I don't like

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Frometa - direct

1 doing it because it hurts. What I do, I go to the grocery, I  
2 go to the shopping, I ask for delivery or I have a little cart  
3 which I take home and then my aunt will come down and she will  
4 bring the food upstairs.

5 Also, to do laundry is very difficult for me. I can't  
6 carry the bag. My aunt will bring it down. I take my laundry  
7 to the Laundromat, I ask for help to take it out of the cart  
8 and the lady who put it on the other cart and then I put the  
9 clothes in the machine, wash it, same thing, I have to go help,  
10 help, help.

11 Q. Ms. Frometa, can you do your nails?

12 A. I cannot do -- actually bring my feet and go down like  
13 this. I cannot. I have to either go to the pedicure, which is  
14 very expensive, or have somebody do it.

15 Q. Who usually helps you at home?

16 A. My aunt helps me for almost everything. She helps me for  
17 almost everything.

18 Q. What does she do for you?

19 A. She used to do all the laundry in the past, but she helps  
20 me to just bring it up and down. Also, I can only do light  
21 dishes. I can't mop the floor because it requires my body  
22 bending. I can sweep the floor or do the water -- I put some  
23 water on the mop and just go once over it. That's fine. I  
24 notice also I cannot open jars like red peppers, I cannot open  
25 that jar. I don't have the strength on my right arm anymore or

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Frometa - direct

1 my left arm. But if it's not too tight, I can open it.

2 Sometimes I need help, I will ask for assistance. But those

3 jars, to open, when I want to open things to cook, it's very

4 difficult. I cannot open.

5 Q. Ms. Frometa, can you work right now?

6 A. No, I cannot.

7 MR. COFFEY: Objection.

8 THE COURT: Overruled. Just answer yes or no.

9 A. No.

10 Q. What is the reason for you not working?

11 MR. COFFEY: Objection.

12 THE COURT: Sustained.

13 Q. Ms. Frometa, have any doctors told you that you should not

14 work or you should be working part-time?

15 MR. COFFEY: Objection.

16 THE COURT: Sustained.

17 Q. Ms. Frometa, what is your understanding of your doctor's

18 treatment? Is your understanding that any of them recommended

19 for you to stay out of work?

20 MR. COFFEY: Objection.

21 THE COURT: Sustained.

22 Q. Ms. Frometa, can you dance right now?

23 A. Not at all. Out of the question.

24 Q. Can you work as a flight attendant?

25 A. Not at all because of the safety of the passenger is

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Frometa - direct

1 first --

2 THE COURT: We have heard all of this. Are you  
3 finished or do you have something new to talk about?

4 MR. PLATTA: I'm almost finished, Judge.

5 THE COURT: I don't care about length. I would like  
6 for the jury to hear it once. That's the way it's supposed to  
7 work here in the United States.

8 MR. PLATTA: Thank you, your Honor.

9 Q. Ms. Frometa, what is your understanding of your future  
10 medical care?

11 A. My understanding --

12 MR. COFFEY: Objection.

13 THE COURT: Sustained.

14 MR. PLATTA: I have nothing further, Judge. Thank  
15 you.

16 THE COURT: Any cross?

17 MR. MILLER: Yes, your Honor.

18 CROSS-EXAMINATION

19 BY MR. MILLER:

20 Q. Ms. Frometa, good afternoon.

21 A. Good afternoon.

22 Q. Do you recall that you and I met back in December of 2007  
23 at your deposition?

24 A. I remember you.

25 Q. I asked you a series of questions, correct?

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Frometa - cross

1 A. Yes.

2 Q. Do you remember giving me testimony that you worked for  
3 three weeks to four weeks following this incident on February  
4 14, 2007?

5 A. I did say that and I apologize, but I did work on the 17th.

6 Q. Ma'am, I promise I am going to go as fast as I can. I need  
7 quick, short, direct answers. You testified in December of  
8 2007 that you worked three to four weeks after the accident?

9 MR. PLATTA: Objection.

10 THE COURT: Why don't you read it. Let me explain to  
11 you why sometimes the depositions are read. They are really  
12 something called prior inconsistent statements. And they are  
13 used for you to examine and think about when you deliberate as  
14 to whether this impeaches the credibility of the witness. If  
15 in fact it is immaterial, it really doesn't make much  
16 difference. If it's a material contradiction from what the  
17 witness has said on the stand, then you can balance it against  
18 her credibility and use it as a function of determining that  
19 credibility. That's why it's better for him to put a question  
20 and an answer than for him to sort of paraphrase.

21 Q. Ma'am, I read from the testimony --

22 THE COURT: Did you make these answers to these  
23 questions is the way it's supposed to be done.

24 Q. Have you employed in any capacity in terms --

25 MR. PLATTA: Page.



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Frometa - cross

1 MR. MILLER: Page No. 15, line 4. I should strike  
2 that. Hang on one moment: I withdraw that, your Honor.

3 Q. Ma'am, do you remember --

4 THE COURT: After all that prelude from me, you're  
5 going to withdraw it. I'm kidding. Go right ahead.

6 Q. I'm sorry. I found it. Page 14, line 11:

7 "Q. When is the last time danced?"

8 Line 14.

9 "A. Probably three weeks after the accident, up until maybe  
10 four, but just no longer than five hours due to pains and  
11 aches."

12 Do you remember giving that testimony?

13 A. I did. And I'm sorry I said that.

14 THE COURT: Just a yes or no question. Did you make  
15 those answers to those questions and you said yes?

16 THE WITNESS: Yes.

17 Q. Ma'am, do you remember testifying that you had a New York  
18 State driver's license at the time of the accident?

19 A. I'm sorry?

20 Q. Do you remember giving testimony that you had a New York  
21 State driver's license at the time of the accident?

22 MR. PLATTA: Objection.

23 A. I had a U.S. driver's license, yes.

24 Q. A New York State driver's license?

25 A. U.S.

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Frometa - cross

1 THE COURT: What is a U.S. driver's license?

2 MR. MILLER: I don't know, your Honor. I am going to  
3 try to figure that out.

4 Q. Ma'am, what I'm showing you right now is a copy of the  
5 police report that was admitted into evidence by stipulation.

6 A. Yes. I see it here.

7 Q. Ma'am, there is no question.

8 A. I'm sorry.

9 THE COURT: Where do you get your U.S. driver's  
10 license?

11 THE WITNESS: In Boston, Massachusetts. When I lived  
12 there, I had a Boston, Massachusetts. And when I came here, I  
13 kept it because it's good until 2010.

14 THE COURT: So it's a Massachusetts license?

15 THE WITNESS: Yes.

16 Q. Ma'am, do you remember giving the following testimony, line  
17 61 -- page 61.

18 THE COURT: This is a stipulated exhibit.

19 MR. PLATTA: Note my objection. Goes to the way the  
20 accident happened, and I would object to the portion --

21 MR. MILLER: It's already --

22 THE COURT: You can't have it both ways.

23 MR. PLATTA: Your Honor, I was trying to avoid any  
24 confusion.

25 Q. Ma'am, do you remember this question, line 12: Did you

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Frometa - cross

1 have a driver's license in good standing?

2 "A. Yes."

3 A. Yes.

4 Q. "QUESTION: What kind of driver's license was it?

5 "A. A regular driver's license.

6 "Q. Was it issued by the New York State?

7 "A. New York State."

8 MR. PLATTA: Which page?

9 MR. MILLER: Same page I said before, 61.

10 Q. Do you remember giving that testimony?

11 A. Yes.

12 Q. Is that testimony accurate?

13 A. Yes.

14 Q. It was accurate?

15 A. Yes.

16 Q. Because of the driver's license that's reflected on the  
17 police report is inaccurate?

18 A. That's a U.S. driver's license. It's legal.

19 Q. Ma'am, you see -- if you look in front of you where it says  
20 the address on your license plate, it says Winchester,  
21 Massachusetts?

22 A. Yes.

23 Q. That was the address on your license?

24 A. I'm sorry?

25 Q. That was the address on your license?

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Frometa - cross

1 A. At the time, yes.

2 Q. So when the question was asked: Was it issued by New York  
3 State in reference to your driver's license and you said New  
4 York State, that was inaccurate?

5 A. I guess so. I'm so sorry. I'm sorry I said that.

6 Q. Ma'am, do you remember your testimony before where you  
7 stated you lost consciousness?

8 A. I lost consciousness, yes.

9 Q. And you said you lost consciousness for a few minutes?

10 A. I don't know how long, but I did lose consciousness for a  
11 few minutes.

12 Q. Do you remember you testified about the ambulance coming?

13 A. The where?

14 Q. The ambulance coming to the scene.

15 A. The ambulance came in when I woke up from the blackout. I  
16 call 911.

17 Q. Do you remember telling anyone, any of the ambulance  
18 drivers or EMTs, that there was no loss of consciousness, LOC,  
19 denies loss of consciousness?

20 A. No, never. I'm sorry. I don't understand.

21 Q. I apologize. Is there a chance that the ambulance drivers  
22 got it wrong and they misunderstood you and they misunderstood  
23 the witnesses at the scene and they wrote down that you were  
24 unconscious?

25 MR. PLATTA: Objection.

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Frometa - cross

1 Q. You denied consciousness?

2 THE COURT: Overruled.

3 A. No, I did not deny consciousness.

4 Q. Ma'am, you testified a few minutes ago that the airlines,  
5 Excel Airlines, called you a couple of days later, correct?

6 A. I'm sorry?

7 Q. You said Excel Airlines, where you were a flight attendant,  
8 called a couple of days later?

9 A. Yes, they did.

10 Q. I want to show you what's already been marked into  
11 evidence, your flight log.

12 MR. PLATTA: Actually, it wasn't.

13 MR. MILLER: The judge already ruled on this.

14 MR. PLATTA: Objection.

15 THE COURT: What's the number and we will see if we  
16 made an error, which is certainly possible.

17 MR. MILLER: For good measure, your Honor, I also note  
18 that this was also under -- this was submitted with an  
19 affidavit under evidentiary Rule 904 and Mr. Platta was given  
20 full access to these documents and without objection these  
21 documents were provided.

22 THE COURT: Do you have a defendant or plaintiff  
23 number for the exhibit?

24 MR. PLATTA: Your Honor, to save time, I will  
25 stipulate from these records. I have nothing to hide. That's

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Frometa - cross

1 fine.

2 THE COURT: That's very kind of you. Let's move  
3 along.

4 If you're going to introduce others, since it doesn't  
5 seem to work, do it, please, over lunch, make sure that both  
6 sides agree they are admissible under my ruling or, in fact,  
7 they were agreed to in the stipulation.

8 Q. You see this document in front of you? Have you ever seen  
9 a document that looks like this?

10 A. Yes.

11 Q. This is a flight log, correct?

12 A. Yes. But I haven't seen that in a while, so I have to go  
13 over it.

14 Q. No problem. We have got plenty of time. You testified  
15 that you waited two days before getting a call from the  
16 airline?

17 A. Correct. They call me about two days after the accident,  
18 yes.

19 Q. If you notice, that the first entry on there is for  
20 February 16 that says KCOS, correct?

21 A. KCOS.

22 Q. It says arrive, next to it, at KISP?

23 A. We do three flights a day.

24 Q. I understand. Do you understand the first entry to mean  
25 Colorado Springs?

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Frometa - cross

1 A. I guess so.

2 Q. It says: Out at BLK out, that's 4:32. That's a.m.,  
3 correct, military time. That means you were on a flight going  
4 from Colorado all the way to Islip, Long Island on February 16?

5 A. I guess so, if that's what it says.

6 Q. If you're on a flight at 4:32 a.m. leaving Colorado, didn't  
7 you have to fly out there to Colorado and you flew out on the  
8 15th of February?

9 A. I didn't fly out on the 15th, no.

10 Q. How did you get to Colorado on February 16 to be on a 4:30  
11 flight?

12 MR. PLATTA: Objection.

13 THE COURT: Overruled.

14 A. I don't remember. Whatever is here, that's what it is.

15 Q. Fair enough. I'll move forward then.

16 On February 16, at 5:38, you left Islip, Long Island,  
17 and you went to White Plains, is that correct?

18 A. Yes. To pick up some passengers.

19 Q. Later that day -- I remind you, less than 36 hours after  
20 this February 14 accident?

21 A. Yes.

22 Q. On February 16, at 8:22, you flew from White Plains back to  
23 Rifle, Colorado?

24 A. We do that.

25 Q. That's a four hour and 42 minute flight?

899MFROT

Frometa - cross

1 A. That's great.

2 Q. So my understanding, if I add it up, on February 16, you  
3 have three hours and 18 minutes going from Colorado Springs to  
4 Islip, you had Islip to White Plains for an hour and 24  
5 minutes, and then you had White Plains to Rifle for four hours  
6 and 42 minutes.

7 So, ma'am, is it fair to say you had approximately  
8 eight and a half hours of flight time just on February 16  
9 alone?

10 A. I'm glad I was working, yes.

11 Q. You don't know how you arrived in Colorado to fly a 4:32  
12 a.m. flight?

13 A. We didn't have any passengers. I don't believe we had any  
14 passengers. We were empty flight.

15 Q. That wasn't my question, ma'am. Let me ask it again. Do  
16 you know how --

17 MR. PLATTA: Over objection.

18 Q. -- from February 14, to the time of the accident, until the  
19 time you left the Colorado airport on February 16, do you know  
20 how you physically got from New York City to Colorado?

21 A. On the 14th, 15th, I was home stiff, I didn't go anywhere.  
22 I went to see the lady to fill out --

23 Q. That's not my question. Do you know how you got from New  
24 York to Colorado to fly on a 4:30 a.m. flight, approximately  
25 4:30 a.m. flight on February 16?



899MFROT

Frometa - cross

1 A. I don't remember.

2 Q. That's all I asked.

3 Ma'am, let's take a look at the next entry on here.

4 February 19. You fly to -- February 19, you fly from West Palm  
5 Beach, you fly to West Palm Beach, Florida, is that correct?

6 A. That's what they have there, yes.

7 Q. And on February 19, you fly from West Palm, 3:32, to Aspen,  
8 correct?

9 A. That's what flight attendants do.

10 Q. That's nearly a five-hour flight, four hours, 48 minutes?

11 A. Yes. I'm glad I was working.

12 Q. Ma'am, how did you get down to Florida? That's not listed  
13 on here.

14 A. They call it deadhead. If the pilots already have the  
15 aircraft in another state, then my manager will call me to say,  
16 you have to catch a flight, you are going to catch it in  
17 Florida. You have to catch a flight out of LaGuardia or Newark  
18 or whatever. Here is your flight number and everything. This  
19 is already paid for. I have to dress like this --

20 Q. Ma'am, I don't have a question.

21 A. Sorry.

22 Q. When you go out to Colorado on these deadhead flights, do  
23 you go skiing in between?

24 A. No.

25 THE COURT: Wait for the question and then try and

899MFROT

Frometa - cross

1 answer it directly, briefly, short.

2 Q. We will come back to the flights in a moment. I want to  
3 show you your employment application.

4 MR. PLATTA: Objection, your Honor.

5 MR. MILLER: This was ruled on already.

6 THE COURT: If you give me a number.

7 MR. MILLER: I ruled on this right at the beginning of  
8 the trial.

9 MR. PLATTA: Your Honor, there is a difference between  
10 attendant records and employment records.

11 THE COURT: You haven't answered my questions.  
12 Doesn't anybody answer questions here?

13 MR. PLATTA: Yes, your Honor.

14 THE COURT: This is an effort to make things happen  
15 quicker. I gather it's DI and DJ. Unfortunately, neither of  
16 you can see that, but indeed with certain redactions they were  
17 both admitted. In fact, I ruled on them and the decision I put  
18 out or will put out later today in more detail, but for the  
19 moment, they are admissible.

20 MR. PLATTA: Your Honor, what about the redactions?

21 THE COURT: What are they? You are supposed to  
22 provide them. I'm not supposed to do the redacting.

23 MR. MILLER: I'm not making any suggestions for  
24 redacting. I don't see any need here for employee records from  
25 Excel Aire.

899MFROT

Frometa - cross

1 MR. PLATTA: Your Honor, I think would be prejudicial  
2 to my client if her employment history is at issue here. It's  
3 an accident case and it's not an employment case.

4 THE COURT: I think that's absolutely the wrong  
5 answer. You want to try another?

6 MR. PLATTA: No, your Honor. Thank you.  
7 Q. Ma'am, I am going to show you your employment application.

8 MR. PLATTA: Your Honor, note my exception to this  
9 ruling.

10 THE COURT: I am not going to note your exception  
11 because as far as I'm concerned, if you wanted it redacted, we  
12 agreed that it should be redacted. I did not agree that the  
13 Court will do the redacting.

14 MR. PLATTA: Your Honor, at this point, these records  
15 are going without redaction. That's what I'm opposing.

16 THE COURT: You had all the time in the world after my  
17 ruling to do the redaction and get it agreed to by your  
18 adversary and nothing happened. So the fellow doesn't have it  
19 redacted now. Does that mean I should keep it all out or  
20 should I let you stand up after each line you think should have  
21 been redacted?

22 MR. PLATTA: Your Honor, at this point I will have no  
23 objection to the records. The jury will see them and I have no  
24 problem with them anymore.

25 THE COURT: Comforting.

899MFROT

Frometa - cross

1 Q. Ma'am, what's the date on this employment application?

2 A. 2/16/07.

3 Q. You went and filled out that application at the start of  
4 your first flight, correct?

5 A. I started my first flight on that day.

6 Q. Ma'am, the second page of your application states that  
7 there is an authorization. You see that certification, all  
8 those legal lines. You see that?

9 A. Where?

10 Q. Right over here. I certify that the facts contained in  
11 this application -- you see that sentence -- are true and  
12 complete to the best of my knowledge and understand that  
13 falsified statements of this application will be grounds for  
14 dismissal. You see that statement?

15 A. Yes.

16 Q. You made a certification, you signed underneath, correct?

17 A. Yes.

18 Q. And you signed it actually on February 17, after you  
19 returned from your flight, correct?

20 A. I guess so.

21 Q. Ma'am, I should go back to the first page of the  
22 application. You listed a few of your employment locations,  
23 correct?

24 A. Yes.

25 Q. Those aren't all the employment locations that you've

899MFROT

Frometa - cross

1 testified since you've been here today, is it?

2 A. No.

3 Q. You left out other airlines, you --

4 A. They asked me, put the one that you want to. You don't  
5 have to put them all.

6 Q. You chose which ones that you thought were important, such  
7 as Cone-Opt will be more important than the airlines that you  
8 were laid off from?

9 THE COURT: Sustained. Enough already on this  
10 credibility issue. Can we move along?

11 MR. MILLER: Sure, your Honor.

12 MR. PLATTA: Your Honor, can I approach?

13 THE COURT: No. After your last effort at the side  
14 bar, I think we will maintain our positions of not having any.

15 Q. I am going to show you, ma'am, in deference to my counsel  
16 here, just your attendance records.

17 MR. PLATTA: Your Honor, please note my objection.

18 THE COURT: I don't know what we are talking about.  
19 Do you have a number or a letter?

20 MR. PLATTA: Your Honor, these employment records  
21 actually show the amount paid by my client or for my client and  
22 employment -- lost wages are not part of this lawsuit and  
23 that's why I was preventing these records from getting to the  
24 jury.

25 MR. MILLER: Mr. Platta, I am willing to stipulate to

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Frometa - cross

1 the earning dollars on the side. What I am more interested in  
2 is the attendance of Ms. Frometa showing up at Rick's Cabaret.

3 THE COURT: We will take away the dollars and we will  
4 talk about the timetables.

5 MR. MILLER: Here we go. The dollars are taken away.

6 Q. Ms. Frometa, you see that document in front of you,  
7 correct?

8 A. Yes.

9 Q. This is called the RCI NYC entertainer charge summary, is  
10 that correct?

11 A. Yes.

12 Q. And this would be a printout from Rick's Cabaret in  
13 Manhattan?

14 A. Yes.

15 Q. This would be the document that would log when you worked,  
16 correct?

17 A. I guess so.

18 Q. I want you to take a look at this document and tell me, did  
19 you work on February 17? You did, correct?

20 A. I don't see nothing here.

21 Q. How about February 17?

22 A. On the bottom?

23 Q. Yes.

24 A. I was between flying and dancing, yes.

25 Q. Just so I understand, when you say February 13, that was

899MFROT

Frometa - cross

1 the night going into the date --

2 A. Where is the 13th?

3 Q. Ma'am, when you look at February 13 --

4 A. Yes.

5 Q. -- that is the night that you were working going into the  
6 day of the accident, correct?

7 A. Yes, correct.

8 Q. So if you worked on February 13, and the accident happened  
9 February 14, that would be at 4:30 in the morning, correct, on  
10 the 14th?

11 A. What do you mean 4:30 in the morning, what?

12 Q. The accident occurred at approximately 4:30 a.m. on  
13 February 14 that we are here for today?

14 A. Whatever the police report says.

15 Q. I am going to suggest to you that it happened at  
16 approximately 4:30.

17 A. If you say so, okay.

18 Q. So February 13 you worked, February 14 you had the  
19 accident, correct?

20 A. Yes.

21 Q. Somehow, on February 15 you had to get out to Colorado?

22 A. No. February 13. 15. I was home and stiff. I got a  
23 phone call on February 15 that I may be on a flight on the 16th  
24 or 17th.

25 Q. Ma'am, the flight was February 16, correct?

899MFROT

Frometa - cross

1 A. Yes.

2 Q. We talked about that before?

3 A. Yes.

4 Q. And you had the flight on February 16 started at  
5 approximately 4:30 a.m.?

6 A. What day?

7 Q. February 16.

8 A. The flight started, yes.

9 Q. So in order to be out on the 16th, at 4:30 a.m. in  
10 Colorado, how --

11 A. 4:30 a.m. in Colorado?

12 Q. Yes. I'll show you the other record.

13 A. Whatever I have there, that's right. You're right. I  
14 don't remember what I have for dinner last week.

15 Q. You don't remember the other car accidents, correct?

16 MR. PLATTA: Objection.

17 THE COURT: Sustained.

18 A. Yes.

19 Q. Ma'am, February 17, did you work?

20 THE COURT: She says she doesn't remember what she had  
21 for dinner last week.

22 MR. MILLER: Judge, I'm asking --

23 THE COURT: Mr. Miller, forget it.

24 Q. Ma'am, do you remember any of the dates on the 22nd?

25 A. I'm sorry?



899MFROT

Frometa - cross

1 Q. Did you work at Rick's Cabaret on the 22nd?

2 A. If it's on record, I did.

3 Q. I'll submit all these, but you agree that you worked from  
4 February 17 all the way through to April 18, correct?

5 A. Yes. But only 20 days.

6 Q. April 18. The jury can count the days on the chart. I  
7 actually -- it's 27 or 28.

8 A. But not 60 days.

9 Q. Because you're also working at the airlines?

10 A. It's okay for me to work. I'm a workaholic.

11 Q. There is no question.

12 MR. PLATTA: Objection, your Honor.

13 THE COURT: Sustained.

14 Q. Your first consultation with Dr. Davy, was that on April  
15 20?

16 A. It was about few months after the accident.

17 Q. Couple of months?

18 A. Couple of months after the accident.

19 Q. If Dr. Davy testified the first time he saw you April 20  
20 and your records demonstrate that you were first seen by Dr.  
21 Davy on April 20, you accept that, correct?

22 A. Whatever you have there, that's what it is.

23 Q. Ma'am, I forgot to ask you a question. I am going to show  
24 you something back on Rick's records. Ma'am, back on February  
25 29 you got -- February 29, you got a charge-back, correct?

899MFROT

Frometa - cross

1 They gave you an adjustment?

2 THE COURT: You sure it was a February 29.

3 MR. MILLER: I'm sorry. March 29.

4 MR. PLATTA: Objection, your Honor. Out of court  
5 statement.

6 MR. MILLER: It's a business record.

7 MR. PLATTA: Out of court statement.

8 THE COURT: Overruled. Didn't we go through all these  
9 and rule on them. Why are you getting up and making  
10 objections? Do you have a copy of my rulings in front of you?

11 MR. PLATTA: Yes, your Honor.

12 THE COURT: Let me see it.

13 MR. PLATTA: Not in front of me, but I have it  
14 somewhere here.

15 Q. You see a March 29, '07 entry?

16 A. No, I don't see it.

17 Q. I am going to point right over here.

18 A. I don't see it.

19 Q. You see where it says March 29?

20 A. Okay.

21 Q. March 29?

22 A. Okay.

23 Q. There is a charge-back over here. It says no fee. You  
24 know why it says no fee. It says that you were in a car  
25 accident on March 16?

899MFROT

Frometa - cross

1 MR. PLATTA: Objection.

2 A. No. They got it wrong. They got it wrong. They made a  
3 mistake.

4 Q. Let me ask you another question. They got it wrong. And  
5 when they got it wrong on March 16 -- on March 17, they noted  
6 you were a no-show on the 16th and two weeks later they gave  
7 you the charge-back, correct? You see the 17th entry?

8 A. What do you mean, the charge-back? What does that mean?

9 Q. They didn't charge you your dancing fee, correct?

10 A. Whatever they have, that's what it is.

11 Q. So they indicate here that you were a no-show on March 16,  
12 correct?

13 A. Okay.

14 Q. We talked about that other car accident on March 8 as well  
15 and you were also a no-show on March 8.

16 A. I don't know what to tell you. It's on record, it's on  
17 record.

18 Q. So the incident before when you testified to Mr. Platta  
19 about a car rental on March 8 and they accused you of being in  
20 an accident, you said you weren't in an accident, correct?

21 A. Whatever you have on record, that's fine.

22 Q. And the record that says March 16 that you were in an  
23 accident as well, that record is wrong?

24 A. No. Because I called them on the 16th and that's when I  
25 called them. I didn't call them the same date of the accident.

899MFROT

Frometa - cross

1 Q. Ma'am, the 16th you were a no-show, correct, and it wasn't  
2 until March 29 that they gave you the credit back, correct?

3 A. I don't know how they do things there. I don't know.

4 Q. Maybe we will hear from them later.

5 A. That's fine.

6 Q. You talked a little bit before about responsibilities as a  
7 flight attendant, correct?

8 A. Yes.

9 Q. Did you tell anyone when you applied for this job that you  
10 had any back problems or you were in an accident the day  
11 before?

12 A. I did. I told her, look, I just got into an accident,  
13 something happened, but I don't know how serious it is.

14 Q. I didn't ask you what you told him. Did you speak to her?

15 A. Yes.

16 Q. Who did you tell?

17 A. To the lady that hired me.

18 Q. What's her name?

19 A. I forgot. I have to look for it.

20 Q. Are you required to wear high heels when you work as an  
21 tenant?

22 A. No.

23 Q. Were you required to wear high heels as a dancer?

24 A. Two inches.

25 Q. You testified in all the questions that I just asked you,

899MFROT

Frometa - cross

1 those records were listed essentially as entertainer charge  
2 summaries. That's when you're in the role of a dancer?

3 A. Entertainer what?

4 Q. It was entitled up top, entertainer charge summary. This  
5 is for when you were dancing, correct?

6 A. I guess so.

7 Q. You testified you also waitressed?

8 A. Yes.

9 Q. I apologize because maybe Rick's Cabaret didn't send me the  
10 entire file. If these are the days you danced -- and you  
11 danced, you say 20, I say 28, 27. The jury will count. How  
12 many days did you waitress?

13 A. Whenever they needed a waitress at night, they would let me  
14 know.

15 Q. Did you waitress during this time period as well that's not  
16 on these records?

17 A. A couple of times.

18 Q. 20, I say 27, 28 times that you danced, a few times  
19 waitressing, and then you were the flight attendant as well?

20 A. They will not say I waitressed. They will just leave it as  
21 dancer.

22 Q. Then these records reflect the time that you were  
23 waitressing?

24 A. I'm a workaholic. I don't mind working.

25 Q. That wasn't my question. These reflect the times that you

899MFROT

Frometa - cross

- 1     were waitressing, correct?
- 2     A.   I guess so.
- 3     Q.   And you would pay a fee to be a waitress?
- 4     A.   We all do.
- 5     Q.   Do you pay a fee when you dance or do you pay a fee when
- 6     you waitress?
- 7     A.   Both.
- 8     Q.   Same fee?
- 9     A.   Depends.
- 10    Q.   You didn't mention to these doctors about these other
- 11    accidents, did you?
- 12    A.   I did not.
- 13    Q.   That's yes or no.
- 14    A.   No.
- 15    Q.   Did you tell the captain of the airplane that you had these
- 16    accidents?
- 17    A.   They all knew.
- 18    Q.   Do you know the names of the captains?
- 19    A.   No.
- 20    Q.   I don't really want to get into too much detail.  As a
- 21    dancer are you required to move your body, bend, twist?
- 22    A.   No.  The rules here are different.  We are not allowed to
- 23    do floor work.
- 24    Q.   Ma'am, did you ever join a gym since this accident?
- 25    A.   No.  I hate the gym.  I don't like the gym.  It's gross.

899MFROT

Frometa - cross

1 Q. You don't like the gym?

2 A. I don't.

3 Q. You don't think you need a \$18,000 gym membership?

4 A. For physical therapy, for special treatment, yes.

5 THE COURT: Are we coming close --

6 MR. MILLER: I'm almost done. I have two more  
7 minutes.

8 THE COURT: Great.

9 Q. Is it true, ma'am, that your airbag never deployed?

10 A. I'm sorry?

11 Q. On the February 14, '07 accident, your airbag did not  
12 deploy, did it?

13 A. No.

14 Q. And those photographs that we put up before, those were  
15 taken, if you looked at the bottom, within two weeks of the  
16 accident, correct? I believe a week, correct?

17 A. I believe so. I don't know.

18 Q. And there was a tape measure in one of the pictures?

19 A. I saw a tape measure.

20 Q. Was that tape measure put there by your lawyer?

21 MR. PLATTA: Objection.

22 A. I don't know.

23 MR. PLATTA: Objection.

24 A. I don't know my lawyer back then.

25 Q. Do you know who took the photographs?

899MFROT

Frometa - cross

1 A. Probably, at the shop.

2 Q. Ma'am, you said that you live with your aunt and your mom,  
3 correct?

4 A. Correct.

5 Q. Are they here today? Did they come?

6 A. No, they are not.

7 Q. All these other accidents we talked about that you said  
8 were fender benders or insignificant, they are significant,  
9 correct, that you reported them all to your insurance company?

10 MR. PLATTA: Objection.

11 THE COURT: I don't think that was her testimony.

12 MR. PLATTA: Thank you.

13 Q. Ma'am, you testified before that the trial neurostimulator  
14 implants you didn't like, you wanted them out. You took them  
15 out?

16 MR. PLATTA: Objection.

17 A. I did not took them out. I'm sorry. I did not took them  
18 out.

19 Q. You didn't like them?

20 A. They don't work on me. They hurt.

21 Q. Ma'am, when did you implant them?

22 A. I did not implant them. The doctor did.

23 Q. When were they put in?

24 A. On the last five months they implanted it --

25 Q. In May?



899MFROT

Frometa - cross

1 A. Somewhere -- in the last five months one, and they tried  
2 the other one after.

3 Q. Wasn't that about the time that this trial was supposed to  
4 start?

5 MR. PLATTA: Objection, your Honor.

6 Q. Wasn't that the time of the initial trial date?

7 MR. PLATTA: Objection.

8 A. I needed it to try to see what works for me.

9 THE COURT: Overruled.

10 MR. MILLER: I have no other questions.

11 THE COURT: The adjournment of this trial has nothing  
12 to do with her. It was all me.

13 MR. MILLER: Your Honor, I have no other questions.

14 THE COURT: Any redirect?

15 MR. PLATTA: Very short, your Honor.

16 REDIRECT EXAMINATION

17 BY MR. PLATTA:

18 Q. Ms. Frometa, I heard from your testimony when the defense  
19 counsel asked you about deployment of the airbag. Was the  
20 impact from the rear of your vehicle?

21 A. The impact was on the rear of the vehicle.

22 Q. Are you aware that when the impact is from the rear that  
23 the airbag in front doesn't deploy?

24 MR. MILLER: Objection.

25 A. It does not deploy. It does not.

899MFROT

Frometa - redirect

1 THE COURT: She is not a mechanic.

2 Q. Ms. Frometa, how old is your mom?

3 A. My mom is 60.

4 MR. MILLER: Objection. Asked and answered.

5 THE COURT: That's the first time you've raised that,  
6 Mr. Miller. It's commendable if you're catching on. Go ahead.

7 Q. Ms. Frometa, what is your mom doing today? Why is she not  
8 here?

9 A. She is at home. She cannot -- she is basically too old.  
10 She feels tired and she should stay at home.

11 Q. Is she with your sister?

12 A. Yes.

13 Q. Why is she with your sister?

14 A. My sister, she is a schizophrenic, very mentally ill. She  
15 is the violent type and my mom have to take care, take care of  
16 my sister.

17 Q. Are you nervous today?

18 A. Very, very nervous for my future and how do I know I am  
19 going to take care of my family.

20 Q. Are you nervous because of testifying in court with  
21 Mr. Miller, for example?

22 A. No, no.

23 Q. And Ms. Frometa, at the time of the accident, was there a  
24 lot going on when the ambulance came?

25 THE COURT: Sustained. How would she know if she

899MFROT

Frometa - redirect

1 really wasn't with it.

2 Q. Ms. Frometa, you said that you were transported to the  
3 ambulance by two people, right?

4 A. Two ladies, they helped me to get out of the car.

5 Q. Did you have any discussion with anyone from the crew about  
6 anything?

7 A. That I remember, no. Nothing.

8 Q. How would you describe your state of mind from the time  
9 when they were transporting you to the ambulance after you were  
10 hit by 40,000 pounds of truck?

11 THE COURT: That wasn't part of the testimony either,  
12 so I'll sustain the objection.

13 Q. What was your state of mind at the time when you were  
14 getting in to the ambulance?

15 A. Very confused and shaking.

16 Q. And, Ms. Frometa, I just want to make sure that we have  
17 this straight. When I was asking you questions before, you  
18 testified that you were actually working two months after the  
19 accident for the club as a dancer, right?

20 A. Yes. Maybe a little over two months.

21 Q. And you also testified today that you were working for the  
22 flight as a flight attendant?

23 A. Yes, I did.

24 Q. I will ask you one more question. Did you work in any of  
25 those capacities after April of last year?

899MFROT

Frometa - redirect

1 A. I'm sorry?

2 Q. Were you working at all after April of last year?

3 A. No, never.

4 MR. PLATTA: Nothing further.

5 MR. MILLER: Recross, your Honor? Two questions.

6 THE COURT: We are counting.

7 MR. PLATTA: Your Honor, if we are going --

8 MR. MILLER: You already put them in.

9 MR. PLATTA: Your Honor, please note my objection.

10 This is redirect --

11 THE COURT: It's not redirect, first of all.

12 MR. PLATTA: It's recross.

13 THE COURT: Second of all, I have no idea what he's  
14 going to ask, so I can't rule.

15 MR. PLATTA: I just want to say I didn't use that  
16 photo.

17 THE COURT: You didn't use any photos? You ought to  
18 wait until we see what he puts up. It seems to me there were  
19 photos.

20 RECROSS EXAMINATION

21 BY MR. MILLER:

22 Q. Ma'am, you still drive your car today?

23 A. Yes, I do.

24 Q. And do the photographs that you saw before that Mr. Platta  
25 put up on the screen, they also depicted a side impact as well,

899MFROT

Frometa - recross

1 correct?

2 A. Can you go slower, please?

3 Q. The impact of the vehicle, of your collision, was also a  
4 side impact, correct?

5 A. I don't know.

6 Q. If the photographs depict a side impact you have no reason  
7 to dispute the photographs that Mr. Platta showed you?

8 A. I never got out of the car to look at the car.

9 Q. I think I asked you this. Do you still drive your car  
10 today?

11 A. Yes, I do.

12 MR. MILLER: I have no further questions.

13 THE COURT: You're excused. Thank you very much.

14 (Witness excused)

15 THE COURT: I think we will adjourn for lunch. You  
16 can step down, Ms. Frometa. Thank you for having spent the  
17 morning with us and some of the afternoon.

18 THE WITNESS: Thank you so much, your Honor.

19 (Witness excused)

20 THE COURT: Let's agree that we will be back at 2:00,  
21 to not discuss the case amongst yourselves or with anybody  
22 else.

23 (Jury not present)

24 THE COURT: Gentlemen, I've been trying cases for a  
25 long time. If I had to guess, I would guess that you haven't

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1     been in the federal court once. In any event, it's a very  
2     different way of life here and it's good you learn it. Each  
3     side keeps a list of the exhibits and if the judge has ruled on  
4     those exhibits already and if they have an objection they will  
5     say, this is Exhibit P-6 and indeed you called it inadmissible  
6     and then we will know where we are.

7             Second of all, I looked at your charges and apparently  
8     you don't know from anything but CPLR. Just for your  
9     information, in case you get here again, we don't count the  
10    alternates as people that are let go at the end of the trial.  
11    All seven or eight jurors deliberate. You're shaking your head  
12    as you knew that. Why did you give me a charge that says no?

13            In any event, let's try, just try to clean up your act  
14    so that we understand what we are doing, we understand what I  
15    ruled on, we understand what I rule, and we can roll along here  
16    a little faster, which indeed we should be doing at the  
17    defendants' request. They wanted to move it along. You can't  
18    do it if you don't know the players, and the players here are  
19    the exhibits. You've got to understand what they are and where  
20    they are and whether they were ruled in or out. If we hadn't  
21    done that, then I can understand your squabbling. Since I took  
22    a lot of time and spent a lot of effort to try to do that so as  
23    to avoid arguments in front of the jury, I find it very  
24    unfortunate that you guys can't get it. I have a list of those  
25    exhibits and you must have a list, if you listen to me, which

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1 is another problem.

2 We will see you after lunch.

3 MR. COFFEY: Your Honor, if I could, for one moment,  
4 we have three of our experts for this afternoon because we had  
5 come in today, we are going to use this afternoon to put them  
6 on.

7 THE COURT: You are.

8 MR. COFFEY: I will. I want to make sure that I am  
9 doing the direct of all my witnesses. I will keep that  
10 compact. I'm just asking that I can get the three of them  
11 because they are doctors who shifted their schedules around. I  
12 don't know if we need to put limitation on examination for each  
13 of them or how we go through them.

14 THE COURT: Let's hope you don't have more than we can  
15 handle. As far as I'm concerned, I thought I told you that I  
16 was prepared to stay here until we finish. Once again, if you  
17 just listened to what I say, the likelihood is that over time I  
18 don't change my mind.

19 MR. COFFEY: The only reason I thought that changed  
20 was right before the end of the day one of the jurors said they  
21 wanted to get to the U.S. Open.

22 THE COURT: It's over now.

23 MR. COFFEY: I thought it was tonight. I'm sorry.

24 THE COURT: It's been a pleasure.

25 MR. PLATTA: Your Honor, in accordance to what you

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1 said, I did make mistakes in my proposed plaintiff's requests  
2 to charge and my verdict sheet, and I would like to submit  
3 corrected versions.

4 THE COURT: Hand it to my deputy. We will have a  
5 charge conference. We will all learn the law by the end of the  
6 trial. Most of it is state law but it's not all state law.  
7 What isn't is federal and you are going to learn it before you  
8 finish, so don't feel badly.

9 MR. PLATTA: Your Honor, I would also like to request  
10 that before the jury comes back I will be allowed to put a  
11 bad-faith statement on the record.

12 THE COURT: I don't know what you're talking about,  
13 but I'll be here before the jury comes back.

14 (Luncheon recess)

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1 AFTERNOON SESSION

2 2:10 p.m.

3 THE COURT: Mr. Platta, you had a request to make a  
4 statement of some sort before I left. You were going to make  
5 it now when I came out?

6 MR. PLATTA: Yes, your Honor.

7 Your Honor, on May 5 of 2008, I had sent a letter to  
8 both insurance carriers, Carolina Casualty Insurance as well as  
9 State Farm Insurance Company, requesting surrendering of their  
10 policies. The respective policies were 100,000 for State Farm  
11 Insurance and 1 million for Carolina Casualty Insurance  
12 Company. I gave them additional time to respond to that after  
13 which we had this trial. They did not come forward with their  
14 policies, and at this time I'm intending on holding them  
15 responsible for any excess verdict, if applicable. The case  
16 presented today and yesterday proves that the recovery in this  
17 case could exceed 1 million or actually \$1.1 million in  
18 applicable insurance policies. Therefore, I would make a last  
19 effort to request at this point that the policies, insurance  
20 policies, will be surrendered. In case they are not, I will go  
21 after the access after the verdict, if applicable.

22 THE COURT: Fine. Anything else?

23 MR. PLATTA: I would like to include this into the  
24 record of the case, the correspondence that I sent to both  
25 carriers as well as confirmation of receipt.

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1 THE COURT: Not in front of the jury.

2 MR. PLATTA: No. Right here. Only for the record.

3 THE COURT: It was my view that one of these insurance  
4 companies was in fact insuring the personal policy of the  
5 driver of the truck, and I think I told you in so many words  
6 that didn't seem to me to be something that you could be  
7 collecting on.

8 MR. PLATTA: Your Honor, without a decision on the  
9 declaratory judgment action, there will be no clear answer to  
10 this question. I understand your position. I respectfully  
11 disagree.

12 THE COURT: Let's bring in with the jury.

13 MR. PLATTA: Can we move Plaintiff's No. 9 and  
14 continuing to, I believe 12, 9 to 12.

15 (Plaintiff's Exhibits 9-12 received in evidence)

16 THE COURT: I have not imposed time limits because I  
17 think that's sort of a last resort. I think if you know that I  
18 may, you will be guided accordingly.

19 MR. PLATTA: Yes, your Honor.

20 CHARLES KINCAID,  
21 called as a witness by the Plaintiff,  
22 having been duly sworn, testified as follows:

23 (Jury present)

24 THE COURT: I swore the witness. I have sworn the  
25 witness whose name is Kincaid, but I am sure he will spell it

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1 for the record, unless he did already.

2 THE WITNESS: I did already.

3 THE COURT: You may inquire.

4 DIRECT EXAMINATION

5 BY MR. PLATTA:

6 Q. Good afternoon, Dr. Kincaid.

7 A. Good afternoon.

8 Q. Dr. Kincaid, were you hired to prepare a life care plan in  
9 this case?

10 A. Yes, I was.

11 Q. How much were you paid for preparing this plan?

12 A. It was \$5,000.

13 Q. And did you actually prepare this life care plan?

14 A. Yes, I did.

15 Q. Can you tell us something about your education and your  
16 background?

17 A. Yes. I have a bachelor of arts in psychology from the  
18 University of Wisconsin Milwaukee. I have a certificate in  
19 rehabilitation management from DePaul University, master's  
20 degree in criminal justice administration, University of  
21 Wisconsin Milwaukee. I have a Ph.D. in rehabilitation  
22 counseling from Syracuse University, and I have a certificate  
23 in life care planning from Capital University Law School.

24 Q. And did you do any publications regarding life care plan?

25 A. No, I have not.

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Kincaid - direct

1 Q. Doctor, can you tell us, did you actually interview

2 Ms. Frometa in order to prepare this report?

3 A. Yes, I did.

4 Q. When was it?

5 A. That was on April 26, 2008.

6 Q. And did you generate a report as a result of this visit?

7 A. Yes, I did.

8 Q. Can you tell me what were your findings?

9 A. My findings were, after interviewing Ms. Frometa, doing  
10 research, speaking with her doctors, researching costs in her  
11 local area, that she had needs, according to her medical  
12 providers, for continuing care for a neurological pain  
13 management, as well as physical therapy, home health care, and  
14 other needs as well.

15 Q. Doctor, besides preparing this life care plan, how many  
16 times did you prepare such a life care plan in the past?

17 A. I probably have prepared at least 60 to 90 of these in the  
18 last four to five years.

19 Q. What do you do on a daily basis?

20 A. Daily basis I do evaluations for people with injuries, I  
21 assist them to return to work, I do case management, I do  
22 vocational evaluation, career counseling, as well as life care  
23 planning.

24 Q. Doctor, do you know what is the International Academy of  
25 Life Care Planners?

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Kincaid - direct

1 A. Yes. I'm a member of that organization. That's the  
2 organization that provides published standards of practice for  
3 life care planners in the United States.

4 Q. Do you know what is the Commission on Health Care  
5 Certification?

6 A. Yes. That's the body that certifies life care planners in  
7 the United States, and I'm a certified life care planner.

8 Q. Do you know what is the American Board of Vocational  
9 Experts?

10 A. Yes. That's a board that certifies individuals who provide  
11 vocational evaluations. I'm certified as a member of that  
12 board as well.

13 Q. Doctor, can you tell us what were your findings in regards  
14 to the future life care plan for Ms. Frometa?

15 A. Well, after speaking to her doctors, Dr. Davy, Dr. Krishna,  
16 Dr. Babu, they provided me with a list of medical services that  
17 they thought were necessary for her into the future, and there  
18 were several of those and I can go over those in detail, if you  
19 would like.

20 Q. Yes, please.

21 A. There were annual evaluations that were suggested, pain  
22 management evaluations by Dr. Davy.

23 MR. COFFEY: Objection.

24 A. Once yearly.

25 THE COURT: What exactly is your objection, now that

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Kincaid - direct

1 you've learned how to stand up? Maybe you should tell me.

2 MR. COFFEY: The objection is, A, hearsay and, B,  
3 Doctor -- all these doctors testified as to what they believed  
4 the cost and the future treatment would be.

5 THE COURT: The latter is simply the recollection that  
6 I share. So I don't really want to hear what I've hear before,  
7 but I've said that so often that I presume you understand it,  
8 Mr. Platta. If I hear one phrase of the injuries and the  
9 proposed costs that I heard earlier today or yesterday, you are  
10 going to be sitting down.

11 MR. PLATTA: Yes, your Honor.

12 THE COURT: I hope you understand it. It's easy for  
13 you to say yes, but it hasn't seemed to make any difference up  
14 until now.

15 MR. PLATTA: Your Honor, I am only trying to present  
16 to the jury the costs which were not presented before.

17 THE COURT: The costs that were not presented before  
18 I'm prepared to have, although lots of them were. This is a  
19 life care plan. I presume, since I have it in front of me,  
20 that he can testify to the future expenses as well. I haven't  
21 heard all of them, but I have heard a lot, including the  
22 \$18,000 gymnasium fee. So try not to do them again.

23 MR. PLATTA: Thank you, your Honor.

24 Q. Doctor, what were the recommendations?

25 A. The recommendations were for continued pain management

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Kincaid - direct

1 evaluations for psychiatric evaluation and psychological  
2 evaluation, for physical therapy.

3 Q. Can we once at a time. Can you tell me which doctor  
4 recommended what?

5 A. Surely. Dr. Davy recommended pain management.

6 MR. COFFEY: Objection.

7 THE COURT: I don't think you get it. Maybe I should  
8 ask the questions. It's really up to you, but if I hear again  
9 what I've just heard, it's over and we won't have any problem  
10 with meeting our timetable.

11 Why don't you do this. If there are numbers that are  
12 attached to the pain management future, which is, I assume,  
13 what you're talking about --

14 MR. PLATTA: Yes.

15 THE COURT: Let him give us a number which may or may  
16 not have been testified before, but that's all.

17 MR. PLATTA: Sure.

18 Q. Doctor, can you tell me what is the cost for pain  
19 management and evaluation?

20 A. The average cost is \$416.66.

21 MR. COFFEY: Objection.

22 THE COURT: Overruled.

23 Q. Doctor, can you tell me what is the cost for psychiatric  
24 evaluation in the future?

25 A. \$333.33.

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Kincaid - direct

1 Q. And what about psychology evaluation?

2 THE COURT: Sustained. If it's in your report, it's  
3 coming out.

4 Q. Doctor, the three costs that you mentioned, are they per  
5 year or per unit?

6 A. That was per unit, but there they were only one per year,  
7 so it would be both per unit and per year.

8 Q. Which one was per year and which one was per unit?

9 A. Both were only annual, so each one would be both, per unit  
10 and per year.

11 Q. Doctor, what about physical therapy evaluation?

12 A. That cost was \$141.66 and that was once per year, so it's  
13 per unit and per year.

14 Q. And what about physical therapy?

15 THE COURT: I thought that he just asked you.

16 MR. PLATTA: The physical therapy is not the same as  
17 physical therapy evaluation.

18 THE COURT: Tell me the difference.

19 A. The evaluation sets the standards and goals. It determines  
20 what's the appropriate exercises and treatment to provide to  
21 the person. It provides the guidelines for the therapist to  
22 provide that therapy going forward.

23 Q. Dr. Kincaid, regarding physical therapy, what was the cost  
24 per unit?

25 A. \$100 per unit.



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Kincaid - direct

1 Q. And what was the frequency recommended?

2 A. Three times per month for one year.

3 Q. And what about gym membership. We had some numbers before,  
4 but I think they were not exactly correct.

5 A. That was \$122.22 per month and per year is \$1,466.66.

6 Q. That would come out to -- I will withdraw the question.

7 Doctor, was there also a recommendation for a personal  
8 trainer and what would be the cost of that?

9 A. That was \$65 per session and it was once per week for one  
10 year. The annual cost was \$3,120.

11 THE COURT: How long a session is that? I am going to  
12 have to get the name.

13 THE WITNESS: Usually, they are about 45 to 50  
14 minutes.

15 THE COURT: Good to know.

16 Q. Doctor, what about the MRI for the cervical spine?

17 A. Yes. That was recommended by Dr. Krishna once every three  
18 to five years. The cost was per unit was \$1,356.66. And per  
19 year the average cost was \$323.79 when you average it.

20 Q. What was the total cost?

21 A. The total cost for her lifetime or --

22 Q. Lifetime.

23 A. Let me go back to that table. I'm sorry. It's right here.  
24 The lifetime cost is \$13,566.60.

25 Q. What about the MRI for the lumbar spine?

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Kincaid - direct

1 A. That was \$1,363.33.

2 Q. How often was it supposed to be done?

3 A. Every three to five years so that the per-year cost would  
4 be \$323.79.

5 Q. And the total cost of that?

6 A. \$13,566.

7 Q. Is it fair to say that the MRI itself will cost over  
8 27,000?

9 A. Yes, that's right.

10 Q. Is it fair to say that the cost of physical therapy,  
11 evaluation with physical therapy, the total cost of that would  
12 be close to 4,000?

13 A. Yes, that's right.

14 Q. Is it fair to say that gym membership with personal  
15 trainer, the total cost of that would be approximately 5,000?

16 A. Yes, that's correct.

17 Q. Doctor, can you tell me anything about medication? What  
18 kind of medication was recommended and the cost of same?

19 A. The medication recommended by Dr. Davy was Lyrica.

20 MR. COFFEY: Objection.

21 THE COURT: Go ahead.

22 A. The medication when I spoke to him was Lyrica, baclofen,  
23 Opana, amitriptyline, and Esgic.

24 Q. Doctor, what was the cost of Lyrica per year?

25 A. Per year, the cost was \$949.

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Kincaid - direct

1 THE COURT: And he recommended all of these?

2 THE WITNESS: Yes. At the time that I interviewed the  
3 doctors, these were the medications that she was receiving.

4 THE COURT: Did you think they were continued to be  
5 needed?

6 THE WITNESS: Yes.

7 THE COURT: Can you give us the total of the cost  
8 rather than identifying amitriptyline that none of us really  
9 understand anyway?

10 THE WITNESS: Medications. The annual cost is  
11 \$5,668.45. The lifetime cost would be \$237,508.05.

12 Q. Doctor, there was also a recommendation for neurostimulator  
13 trial which was actually done? What was the cost per unit?

14 MR. COFFEY: Objection.

15 A. The cost per unit was \$29,000.

16 THE COURT: I am not sure exactly what this was, but  
17 it was testified to, so we don't need it again.

18 Q. Doctor, was there any cost associated with her daily  
19 living, for example, cost of the shower chair, hand-held  
20 shower, reacher, cervical pillow?

21 MR. COFFEY: Objection.

22 THE COURT: I don't think I remember the cost. What  
23 is a reacher?

24 THE WITNESS: That's a device, it has like a grip and  
25 a trigger and it has two pincers, so a person can reach and

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Kincaid - direct

1 grab an item and bring it to them rather than using the  
2 reacher, rather than having to use their body to reach it.

3 THE COURT: You can answer the total price of all  
4 them, if you will.

5 THE WITNESS: The cost for shower chair was \$47.98.

6 THE COURT: We can combine the shower chair with a  
7 reacher.

8 THE WITNESS: I can give you the cost of all of them.  
9 The aids for independence, the cost, lifetime costs were  
10 \$1831.87.

11 Q. Doctor, what was the cost of neurosurgeon follow-up?

12 MR. COFFEY: Objection.

13 THE COURT: Overruled.

14 A. The cost was \$241 per unit. Four times per year, and the  
15 per year cost was \$966.40.

16 Q. And did you have any neurologist follow-up recommended as  
17 well?

18 A. Yes. That would be Dr. Krishna. The per-unit costs for  
19 once every three months was \$114. The per- year cost was \$456.

20 Q. Total cost?

21 A. The total cost was \$19,152.

22 Q. For the neurologist?

23 A. That's right.

24 Q. What was the total cost for neurosurgeon?

25 A. I don't believe I put it down here, but I can multiply it

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Kincaid - direct

1 for you very quickly, if you'd like.

2 Q. Would it be fair to say that it's around a thousand?

3 A. Yes. It was \$966.40 per year.

4 Q. And was there also a recommendation for pain management  
5 specialist follow-up?

6 A. Yes, there was.

7 Q. What was the cost per unit and total cost?

8 A. Per unit was 239.16 and that was once every six weeks for  
9 one year and once every three months thereafter. There were a  
10 total of 172 visits over her expected life expectancy, and the  
11 total cost was \$41,135.52.

12 Q. Doctor, what about psychologists?

13 A. The psychologists, the frequency was once weekly for six to  
14 12 months, 36 sessions, and then six to eight sessions per year  
15 to lifetime.

16 Q. What was the cost per unit?

17 A. The cost per unit was \$77.50. Per year, you average it, it  
18 was \$595.58. Lifetime cost was \$34,955.

19 Q. Doctor, the home health aide cost, what was the  
20 recommendation and what is the rate for that?

21 A. Forty-eight hours per day, seven day.

22 Q. You said four to eight hours?

23 A. Four to eight, average of six, the cost per unit is \$17.33  
24 and the average cost would be \$103.98 per day. Per year it  
25 would be \$37,930.80.

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Kincaid - direct

1 Q. What is the total cost for that?

2 A. It depends on when you start. If she started immediately,  
3 the full cost would be \$1,590. I'm sorry. 1,590,218.

4 Q. Doctor, you have also asterisks on the bottom of this  
5 table. Can you comment on this?

6 A. Yes. Currently, she is receiving assistance from an aunt  
7 who helps her with her daily living needs, helps her with  
8 dressing, bathing, laundry, cooking, most of her activities of  
9 daily living. If that aunt wasn't available, then she would  
10 need home health assistance. That's why I started it at the  
11 time of writing the life care plan and going forward.

12 THE COURT: How many hours a week is this home health  
13 aide?

14 THE WITNESS: In total it would be 42 hours. It would  
15 be an average of six hours per day. So 42 total.

16 Q. Doctor, how about case management, your specialty?

17 A. Case management would be one to two hours per month. That  
18 would be to assist Ms. Frometa if there were any adjustments to  
19 her plan to make sure she was getting the care and assistance  
20 that she needed.

21 Q. Doctor, can you tell us, what was the total amount that you  
22 came up in this report with?

23 A. There were two options that I arrived at. The first was  
24 option A, which involved having home health care start  
25 immediately so that the total cost with all those items that we

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Kincaid - direct

1 discussed was \$2,325,610.19. If home health care started  
2 later, I am going to use the age of 55, then the total cost  
3 would be \$1,760,114.96.

4 Q. Doctor, when you saw Ms. Frometa at your office, what kind  
5 of background information did you receive from her?

6 A. I questioned her about her living situation, her  
7 educational background, her work history, about her current  
8 living situation, any functional limitations she was  
9 experiencing, pain symptoms, what her plans were for the  
10 future, any proposed medical care.

11 Q. Doctor, did you also review medical records in preparation  
12 for this report?

13 A. Yes, I did. Prior to meeting with Ms. Frometa, I reviewed  
14 records from a variety of hospitals, as well as doctors.

15 Q. Who did you talk to and when?

16 A. I talked to Dr. Davy and that was on the 28th of April, and  
17 I talked to Dr. Krishna on the 1st of May. And Dr. Babu  
18 corresponded, sent back a questionnaire indicating what he  
19 thought were the necessary services in the future.

20 Q. Is it fair to say that you contacted all of her treating  
21 doctors?

22 A. Yes.

23 Q. Doctor, can you tell me what medical records did you  
24 review?

25 A. Yes. I reviewed medical records from the Cabrini Medical

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Kincaid - direct

1 Center, also from Midtown Medical Practice, also from Brooklyn  
2 Hospital, from Westchester Medical Care Center, from Dr. Davy,  
3 Dr. Krishna, Dr. Babu, from the Xcalibur Chiropractic Center.  
4 There were also some records of MRI results.

5 Q. Is it fair to say that you reviewed pretty much all the  
6 providers that treated Ms. Frometa in this case?

7 A. To the best of my knowledge.

8 MR. COFFEY: Objection.

9 THE COURT: Overruled.

10 Q. Doctor, are you aware of the medical history of  
11 Ms. Frometa?

12 A. Yes, I am.

13 Q. What do you know?

14 A. I noted she was involved in an accident on February 14,  
15 2007, that she received care from her physicians. She required  
16 surgery to her lumbar spine in May of 2007, that Dr. Babu  
17 performed the removal of the herniated disk at L5-S1, that she  
18 received ongoing pain management care for a variety of  
19 injections, epidural, facet injections, that she had surgery in  
20 December of 2007, a discectomy to her cervical spine at C3-C4.

21 Q. Doctor, a portion of this report discusses current  
22 functional limitations and behavioral problems. Can you  
23 comment on that?

24 MR. COFFEY: Objection.

25 THE COURT: Sustained.



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Kincaid - direct

1 Q. Doctor, does Ms. Frometa require assistance with activities  
2 of daily living?

3 A. Yes. That's my understanding, that she requires assistance  
4 from her aunt for all of those activities of daily living, that  
5 she has difficulty with physical activities, walking, climbing,  
6 bending, stooping, kneeling, reaching, handling.

7 Q. Is she unable to lift or carry over ten pounds?

8 MR. COFFEY: Objection.

9 THE COURT: Have you not heard this testimony before,  
10 Mr. Platta?

11 MR. PLATTA: From my client I've heard, but not from  
12 experts.

13 THE COURT: But from an expert --

14 MR. PLATTA: I don't remember that, Judge.

15 THE COURT: -- that you put on the stand.

16 MR. PLATTA: No, your Honor.

17 THE COURT: Actually, you did a little better then,  
18 because he said 30 pounds. Shall I find it for you in the  
19 record?

20 MR. PLATTA: No, your Honor.

21 Q. Dr. Kincaid, did you find that my client had difficulty --  
22 poor balance and gait?

23 MR. COFFEY: Objection.

24 THE COURT: I don't remember the balance. I'm very  
25 sensitive to that these days. You can answer that question.

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Kincaid - direct

1 A. Yes. She indicated that that was the case, that she had  
2 difficulty with her gait and her balance.

3 Q. And does she have any problem driving a car?

4 A. Yes. She also indicated that she is limited in both the  
5 amount of time that she can drive to less an hour, and she  
6 requires assistance from her aunt when it has to be moved on  
7 odd and even days. She has difficulty with parking and turning  
8 her neck to do that.

9 Q. Does she also experience difficulty seeing when she has  
10 migraine headaches?

11 MR. COFFEY: Objection.

12 THE COURT: Sustained. I never heard any of that  
13 before.

14 Q. Are you aware that she has difficulty grasping and holding  
15 objects with her left hand?

16 MR. COFFEY: Objection.

17 THE COURT: Sustained.

18 Q. Doctor, are you aware of any other limitations that  
19 Ms. Frometa has?

20 A. I believe that covers them, and I mentioned the  
21 difficulties with her activities of daily living. She also  
22 mentioned she suffered from anxiety and a depressed mood at the  
23 time of the interview, and I administered something called the  
24 back depression inventory. According to her results on that  
25 test, she scored --

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Kincaid - direct

1 MR. COFFEY: Objection.

2 THE COURT: I'll allow it. Go ahead.

3 A. She scored in the severe range for depression.

4 Q. Doctor, what is a life care plan?

5 A. It's a dynamic document that's based on published standards  
6 of practice, comprehensive assessment of the person, data  
7 analysis, research, and it provides a concise detailed plan of  
8 a person's current and future needs related to their  
9 catastrophic injury or chronic health care need.

10 Q. And what was the purpose of such life care plan?

11 A. The purpose is to provide a plan that will allow for all of  
12 the medical services, care, any items, medical items that the  
13 person might need, medications that will assist them to live to  
14 their highest quality of life possible, and to help them  
15 function to their highest level as well.

16 Q. Doctor, what did you base the cost figures in this case?

17 A. My research was, I contacted at least three sources for  
18 each item, so if it was a medical service visit, I would  
19 contact at least providers in the New York City area to  
20 determine what their costs were, and then I average the cost  
21 for those three providers.

22 Q. Would you tell us by looking at your records, who did you  
23 contact and when?

24 THE COURT: No, thanks.

25 MR. PLATTA: Thank you, your Honor.

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Kincaid - direct

1 Q. Sir, can you tell us what is life expectancy and how you  
2 applied that?

3 MR. COFFEY: Objection.

4 THE COURT: Why don't you tell us what hers was.

5 A. Hers was 41.9 years. Her life expectancy is 82 years of  
6 age for females in the United States.

7 Q. Is this based on the National Center of Health statistics?

8 A. Yes. The CDC, the national vital statistics reports, the  
9 United States life tables for 2004.

10 Q. Doctor, which were your own personal recommendations for  
11 Ms. Frometa, not based on any other doctors?

12 MR. COFFEY: Objection.

13 THE COURT: Overruled. Don't answer the question.

14 Q. Doctor, what is your conclusion based on this evaluation  
15 and based on the records that you reviewed and the  
16 conversations that you had with my client and with all the  
17 doctors in this case?

18 A. That Ms. Frometa has medical needs going into the future,  
19 that she will require care from the pain management specialist,  
20 physical therapies, medications to assist her to function, that  
21 she will need help with her activities of daily living.

22 Someone who assist her, that there are some items of assistive  
23 technology that could help her function a little bit more  
24 effectively. She would also need psychotherapy for a  
25 foreseeable period to help her adjust to her disability and

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Kincaid - direct

1 cope with the ramifications of her limitations.

2 Q. Doctor, if I were to tell you hypothetically that there  
3 will be a doctor testifying here in court who states that based  
4 on his independent review of the documents, of the records that  
5 you reviewed, not all of them, but some of them, he concludes  
6 with reasonable medical certainty that the minimal accident of  
7 record did not produce a neurological diagnosis, disability, or  
8 limitation?

9 THE COURT: Sustained. He's not a neurologist. He  
10 just does life planning.

11 MR. PLATTA: That's exactly where I'm going.

12 THE COURT: You have about ten minutes to get there.

13 Q. Doctor, you're not a neurologist, right?

14 A. No, I'm not.

15 Q. You're a life care planner?

16 A. That's correct.

17 Q. Can a neurologist be a life care planner?

18 A. They could be certified as a life care planner.

19 Q. If her not certified, are they considered life care  
20 planners?

21 A. No, they would not be because they would not have the  
22 certification and the training. They may get the training, but  
23 I don't know about this particular individual. They would need  
24 the training in life care planning.

25 Q. If I told you he didn't have the certification, he would

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Kincaid - direct

1 not be a life care planner?

2 A. That my conclusion, yes.

3 Q. Doctor, if I were to tell you, hypothetically, the same  
4 doctor would call your plan ill-advised, horrendous and  
5 unnecessary, would you agree with that?

6 A. I think based on my conversations with Dr. Ban, Krishna,  
7 and Davy, they feel these are necessary items for Ms. Frometa  
8 into the future, so that's who I relied on in doing my plan.

9 Q. Doctor, when you mentioned before that you contacted  
10 different offices in the New York area to assess costs of  
11 medical care necessary for Ms. Frometa, is this a standard  
12 thing to do for life care planner?

13 A. Yes. It's one of the standard research methods to  
14 determine costs for life care plans.

15 Q. Doctor, can you explain for us what is the difference  
16 between present value and -- actually, I will withdraw that.

17 Doctor, are you aware of the term present value?

18 A. Yes, I am.

19 Q. Can you explain that?

20 A. Well, I'm not an economist, so I don't feel competent to  
21 really define that. I think an economist can do that for you.

22 Q. Do you usually work with economists?

23 A. Yes, I do. Once I prepared the life care plan, they would  
24 look at it to determine present value, which would take into  
25 account things like inflation, interest rates. There is

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Kincaid - direct

1 various calculations that they use to give you the cost of the  
2 plan in today's dollars.

3 Q. Did you work in this case with one?

4 A. No, I did not.

5 Q. Does it mean that the life care plan numbers are lower than  
6 they would be with an economist?

7 MR. COFFEY: Objection.

8 THE COURT: Do you know the answer to that question?

9 THE WITNESS: In my experience, the life care plans  
10 that I've completed, they are almost always larger because of  
11 the calculations that are involved and the inflation that  
12 occurs with medical services and items.

13 Q. Doctor, are you aware that some doctors didn't exactly  
14 recommend the same treatment in this case?

15 A. Yes, I'm aware of that.

16 Q. Is this a problem for your life care plan, for assessing  
17 costs and future care?

18 A. No. I look at the totality of the recommendations, and the  
19 plan reflects recommendations for providers.

20 Q. For example, if one of them wouldn't recommend a specific  
21 procedure it wouldn't change the life care plan itself?

22 A. No, it wouldn't.

23 MR. PLATTA: Thank you, Doctor, I have nothing  
24 further.

25 THE COURT: Any cross?

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Kincaid - direct

1 CROSS-EXAMINATION

2 BY MR. COFFEY:

3 Q. Good afternoon.

4 A. Good afternoon.

5 Q. You don't have a Ph.D. or doctorate, is that correct?

6 A. Yes, I do have a Ph.D.

7 Q. In what?

8 A. In rehabilitation counseling.

9 Q. You also have other occupations, though, because you've had  
10 cases with me where you're also a vocational rehabilitation  
11 person as well, isn't that correct?

12 A. That's correct. That's part of my training.

13 Q. We actually have a trial coming up where you say someone  
14 would never work again, is that correct?

15 MR. PLATTA: Objection, your Honor.

16 THE COURT: Sustained.

17 Q. So you have another -- a second occupation, a vocational  
18 rehabilitation. How many people do you see in that business?

19 A. Per year?

20 MR. PLATTA: Objection, your Honor.

21 Q. Per year.

22 THE COURT: I'll allow it. Essentially take it for  
23 what it's worth and it's not much.

24 A. Probably, about three a week.

25 Q. So you do more of that than the life care planning. Is



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Kincaid - cross

1 that fair to say?

2 MR. PLATTA: Objection.

3 THE COURT: Overruled.

4 A. That would be fair to say. It's a combination of the two.

5 Q. Now, would you be surprised if earlier today Ms. Frometa  
6 testified she can ski for up to about half an hour?

7 MR. PLATTA: Objection. That's not the testimony.

8 THE COURT: I don't think that's the testimony either.  
9 So I'll sustain the objection.

10 Q. Are costs different for reimbursement?

11 A. They can be.

12 Q. I want you to assume Dr. Davy testified that on a \$400  
13 thing he said his reimbursement was about \$70. Would you  
14 disagree with that type of reimbursement versus cost?

15 A. If he testified to that, I hadn't talked to him about it,  
16 so I couldn't dispute what he said.

17 Q. He also testified that he never spoke personally with you,  
18 is that correct?

19 A. I have notes that I recall speaking with him.

20 Q. He testified that he spoke with the receptionist from your  
21 office?

22 A. I don't recall that that was the case. I know I have  
23 notes, so I thought I had spoken to him.

24 Q. Was it also -- could it have possibly been your  
25 receptionist or one of your office workers that spoke with him?

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Kincaid - cross

1 A. She did this in a short period, so I do have office staff  
2 that are trained to help me do the research. It's possible,  
3 but I thought I had spoken to him.

4 Q. What portion of it was done by your office staff, that of  
5 your report?

6 A. Some of the research might have been done, some of the  
7 phone calls.

8 Q. When we talk about research that was done, you have no  
9 writing from any of these offices you contacted and you don't  
10 have the names of the people you spoke to, isn't that correct?

11 A. No, that's not correct. I always try to get the name from  
12 each facility. If I can't, I do note the place that I  
13 contacted, their address, their phone number. And if I can get  
14 a name I will put it down.

15 Q. Now, out of all the people you called, I think there is  
16 only about two names out of all the calls and there was a lot  
17 of calls. Would that be fair to say?

18 A. I didn't count them.

19 Q. Why don't you count them. I'd like to know.

20 MR. PLATTA: Objection, your Honor.

21 THE COURT: Sustained. Why don't you count them.

22 Q. I see 57 and you only have two names. So would that be  
23 fair to say?

24 MR. PLATTA: Objection, your Honor.

25 THE COURT: Two names of what?

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Kincaid - cross

1 MR. COFFEY: Two names of people, their identity that  
2 was spoken to other than saying, spoke with receptionist.

3 THE COURT: I don't understand that question. But if  
4 you do, you should answer it.

5 A. Yes. It may have been a receptionist who didn't want to  
6 give her name. Yes, that sounds about right. Oftentimes  
7 people do not want to gave their names, but they will give the  
8 cost information.

9 Q. Couldn't that throw into doubt that if they want to give  
10 you names, they didn't want to give you truthful figures?

11 MR. PLATTA: Objection.

12 THE COURT: Overruled.

13 A. My experience has been, over doing this for many years,  
14 that people do give accurate information because it's a common  
15 thing for people to call up and ask for information about  
16 costs, so they are not going to mislead you.

17 Q. Also, your research costs only targeted the New York City  
18 marketplace, isn't that correct?

19 A. There was a combination of New York and some Brooklyn.

20 Q. Other than Brooklyn and New York, you didn't go anywhere in  
21 Westchester county, Long Island, New Jersey; you only kept it  
22 to this area, correct?

23 A. Correct. Because that was Ms. Frometa's area where she  
24 lived, in Bronx and Brooklyn.

25 Q. Where is it indicated in your report that some people

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Kincaid - cross

1 didn't agree with your assessment, such as Dr. Babu? It

2 doesn't say that anywhere in the report, does it?

3 A. What is in my report is what Dr. Babu recommended for both  
4 follow-up visits and physical therapy.

5 Q. But aren't the biggest costs the future home health care  
6 aide and he put none, isn't that correct?

7 A. Yes. And Dr. Krishna recommended that she do receive it,  
8 and I do note in my tables that he is the recommending  
9 physician for that service.

10 Q. If one doctor does and one doctor doesn't, you did not put  
11 anything in there that said Dr. Babu said she doesn't need  
12 this?

13 MR. PLATTA: Objection.

14 THE COURT: Overruled.

15 A. It would not be necessary because this is a plan for her  
16 future needs and it's based on the treating physician's  
17 recommendations. So I'm documenting who that physician is,  
18 what the service is.

19 Q. Did you assess at any level in your own experience the  
20 weight of the person who has done the actual spinal surgery  
21 versus another treating physician?

22 A. Each one has their own specialty, and they would recommend  
23 services based on their specialty and their training.

24 Q. Were you also aware that Dr. Babu did not recommend  
25 medications?

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Kincaid - cross

1 A. He did not -- the pain management doctor. Dr. Davy was  
2 handling medications. In his response to me, his written  
3 response, he did not indicate anything.

4 Q. And Dr. Babu also only recommended four follow-up visits  
5 for one year, is that correct?

6 A. Yes, for himself.

7 Q. And physical therapy three times per month for one year?

8 A. That's correct.

9 Q. And what was your cost for physical therapy per unit?

10 A. I'll have to go back to that table. The cost was \$100 per  
11 unit.

12 Q. And he extrapolated 36 units then for the year three times  
13 per month, 12 months, one year?

14 A. That's right, \$3,600.

15 Q. So he also didn't recommend any shower chairs, adjustable  
16 beds or neck braces, is that correct?

17 THE COURT: What about reachers.

18 Q. Or reachers. Did he recommend a reacher?

19 A. I recommended that based on my expertise as an assistive  
20 technology practitioner.

21 Q. Did Dr. Babu recommend any medications?

22 A. No, he did not.

23 Q. Did he recommend any future surgeries?

24 A. No, he did not.

25 Q. Did he recommend anything other than a pain management

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Kincaid - cross

1 specialist?

2 A. No, he did not.

3 Q. So if we went with -- he also said that if we went with  
4 what he just recommended, what was our unit cost for follow-up  
5 visits with the pain person four times a year?

6 A. That was -- the unit cost was \$416.66.

7 Q. How much?

8 A. I'm sorry. That's the evaluation. The pain management  
9 specialist, the unit cost was \$239.16.

10 Q. So four visits, that would be about a thousand dollars a  
11 year?

12 A. \$981.75.

13 Q. If we did it that way, that would give us -- if we had done  
14 an alternative plan --

15 MR. PLATTA: Objection, your Honor.

16 Q. We only used Dr. Babu's figures. That would be \$4,581 per  
17 year. Is that fair to say?

18 MR. PLATTA: Objection.

19 THE COURT: Overruled.

20 A. No. It would be fair to say because he did recommend a  
21 pain management specialist, in this case Dr. Davy, who was  
22 recommending the medications as well as a neuro spinal  
23 stimulator.

24 Q. But the cost would be a lot less if we used those numbers,  
25 wouldn't that be correct, if we only relied upon the

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Kincaid - cross

1 recommendations of Dr. Babu. Isn't that correct, yes or no?

2 A. That would be correct.

3 Q. And it would be a lot less?

4 MR. PLATTA: Objection.

5 THE COURT: Sustained.

6 Q. When she came to see you you filled out a history?

7 A. Yes, that's correct.

8 Q. And in the history when you talked about employment or work  
9 experience?

10 A. Yes.

11 Q. There is not much -- did you get much information from her?

12 A. No. My understanding is there was no wage loss claim, so I  
13 got general occupations. That's all.

14 Q. Wouldn't that have been important to get a full picture?

15 MR. PLATTA: Objection, your Honor.

16 THE COURT: Sustained.

17 Q. Now, did she tell you anything about any vocational  
18 information other than work experience?

19 A. No, she did not.

20 Q. Did she tell you about any other prior motor vehicle  
21 accidents she was involved in?

22 A. No, she did not. Let me double check. I don't believe so.  
23 See if there is anything in my records. I just want to double  
24 check.

25 Q. And the first time she came to see you was on April 26,

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Kincaid - cross

1 2008, is that correct?

2 A. That's correct.

3 Q. That's when we were on the eve of trial for the first time,  
4 is that correct?

5 MR. PLATTA: Objection.

6 THE COURT: Why don't you rephrase it.

7 Q. Did our office pay you an expedited fee so we could get  
8 your deposition taken right before when the trial was first  
9 scheduled?

10 A. Yes, that's correct.

11 MR. PLATTA: Objection.

12 THE COURT: First of all, we agreed that you would  
13 stand; second of all, I didn't hear you because you didn't  
14 stand; and, thirdly, he answered the question before you got  
15 your objection and certainly before you bothered to stand up.  
16 So there is very little chance that anybody is going to forget  
17 it if I sustain it, so I am not going to sustain it.

18 MR. PLATTA: Thank you, your Honor.

19 Q. So the life care plan, though, it's fair to say, was done  
20 for litigation purposes, is that correct?

21 A. It was done in a matter where litigation was involved, yes.

22 THE COURT: Do most of your life plans come into  
23 being?

24 THE WITNESS: Probably, the majority, I would say 80  
25 percent at least. This would be in case management matters.



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Kincaid - cross

1 THE COURT: That would have to do with litigation?

2 THE WITNESS: About 80 percent would be litigation,  
3 that's correct.

4 Q. You have no medical training, is that correct?

5 A. I'm not a medical doctor, that's correct.

6 Q. And you have no credentials in psychiatry, is that correct?

7 A. Just in rehabilitation counseling.

8 Q. And are you a CSW?

9 A. No, I'm not.

10 Q. What is that?

11 A. That's a certified social worker.

12 Q. What do they do differently from what you do?

13 A. Social workers, they work with a variety of adults and  
14 children. They will assess a person's needs as well as they  
15 will do counseling on occasions.

16 Q. When you prepared the report you hadn't reviewed the  
17 medical bills, isn't that correct?

18 A. That's correct. They weren't available.

19 Q. So if you were coming up or tabulating the numbers,  
20 wouldn't they be important for you to come up with your  
21 numbers, the bills?

22 MR. PLATTA: Objection.

23 THE COURT: Overruled.

24 A. It's one factor that can be considered, but also I used the  
25 research technique of looking for three cost centers.

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Kincaid - cross

1 Q. You never had reviewed Dr. Davy's bills as we sit here  
2 today, isn't that correct?

3 A. No, I have not received those.

4 Q. And did you ever provide as part of the disclosure a table  
5 of reimbursement rates?

6 A. Reimbursement rates for -- I'm sorry.

7 Q. You said at the deposition, page 23, line 17:

8 "Q. There is some type of table that you talked about the  
9 difference of what is actually reimbursed depends on the  
10 carriers and stuff like that?

11 "A. You can contact carriers to find out. I don't have such a  
12 table."

13 A. That's correct. Again, that was something an economist  
14 would do in terms of the difference between what is an offset  
15 for insurance.

16 Q. Wouldn't it be relevant for coming up with what the cost  
17 is?

18 A. It could be a factor.

19 Q. So it would have been important to have an economist to tie  
20 together the figures you've spoken about, is that correct?

21 A. It would have given you the present value of the costs that  
22 I provided.

23 Q. And the economists would talk about what's been billed and  
24 what's actually reimbursed, isn't that correct?

25 A. They would look at the rate of inflation, any interest

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Kincaid - cross

1 gained from monies. They also look at offsets for any  
2 insurances.

3 Q. They would also project out the present value which could  
4 be -- present value could be less than inflation rates also,  
5 isn't that correct?

6 A. You would have to talk to an economist about that. We were  
7 talking about --

8 Q. Have you ever reviewed the IME reports by the doctors that  
9 we have retained on our behalf in this matter?

10 A. No, they were not provided to me.

11 Q. Did you ask for them?

12 A. I asked for whatever the attorney has that would be  
13 relevant to the case.

14 Q. Could alternative expert opinions been relevant to the  
15 conclusions you came up with?

16 MR. PLATTA: Objection, your Honor.

17 THE COURT: I heard you. I haven't ruled that. I'm  
18 sorry. Overruled.

19 A. In the case of a life care plan, it incorporates the  
20 opinions and the recommendations of the persons, treating  
21 providers. So those might be more important to you or relevant  
22 to your case.

23 Q. And then you spoke earlier and talked about present values.  
24 You're not sure about they are significantly lower, is that  
25 correct? You have no way of opining on that?

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Kincaid - cross

1 MR. PLATTA: Objection.

2 THE COURT: Sustained.

3 Q. Do you recall giving a question, page 51:

4 "Q. So all the present values with offsets could be  
5 significantly lower than you're doing?

6 "A. I don't know. That would need an economist.

7 "Q. Would you need an economist to come up with the final  
8 number?

9 "A. When it reflects all of the factors that we discussed."

10 A. That would be my testimony.

11 Q. Also, you were asked, page 53, line 14:

12 "Q. So it's fair to say, Doctor, that you could come to the  
13 conclusion of the ultimate evaluation without an economist?

14 "A. The economist would be important to get it back to present  
15 value and take in account all offsets, insurance, no fault and  
16 otherwise."

17 You agree with that?

18 A. That would still be my testimony.

19 Q. Now, have any of the doctors told you that she was fully  
20 disabled as a result of this accident?

21 A. I don't recall them using that term. Just that she was  
22 disabled and had functional limitations. I don't recall seeing  
23 or hearing that term totally or permanently disabled.

24 Q. Did anybody talk about a permanent partial disability with  
25 you?

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Kincaid - cross

1 MR. PLATTA: Objection, your Honor.

2 THE COURT: Overruled.

3 A. I don't recall that term being used.

4 MR. COFFEY: I have no further questions. Thank you  
5 very much.

6 THE COURT: Anything, any redirect?

7 MR. PLATTA: Yes, your Honor.

8 REDIRECT EXAMINATION

9 BY MR. PLATTA:

10 Q. Doctor, defense counsel used the word permanent and total  
11 disability?

12 A. Yes.

13 Q. Did you actually ask the doctors about that or it just  
14 wasn't the subject of your conversation?

15 A. It wasn't the subject of the conversation. I didn't ask  
16 the question.

17 Q. Therefore, they would never respond to it, is that correct?

18 A. That's correct.

19 Q. Doctor, defendants' counsel mentioned to you that you did  
20 not review his expert's report. Are you aware that his expert  
21 was actually retained after your report was prepared so,  
22 therefore, you couldn't include it in your report? Are you  
23 aware of it?

24 A. No, I was not aware of that.

25 Q. When you mentioned that you have contacted different

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Kincaid - redirect

1 offices in the New York City area to assess the cost of future  
2 medical care, do you have their names, not the people, but the  
3 places where you called?

4 A. Yes, I do. I have a full list.

5 Q. Do you have their phone numbers?

6 A. Yes, I do.

7 Q. Therefore, is this verifiable?

8 A. Yes, it is. You can call and verify the costs.

9 Q. In your practice, is it important to know the name of the  
10 person who responds to the phone call or the name of the place  
11 that you're calling to obtain information from?

12 A. It's much more important to have the name of the provider,  
13 the name of the facility so that it can be verified and someone  
14 went to check and call.

15 Q. Doctor, what kind of life care plan would it be, in your  
16 opinion, if you just based it on one doctor and not on the  
17 opinion of all the doctors? Would it be a complete life care  
18 plan?

19 A. It would be unethical on my part because the standards of  
20 practice call for the life care planner to incorporate all of  
21 the providing treating physicians and therapists.

22 Q. In other words, if you had followed the defense counsel  
23 advice you would be unethical in your work?

24 A. That's correct.

25 Q. And, Doctor, defense counsel mentioned to you something

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Kincaid - redirect

1 else. They said about prior accidents. Was it ever of your  
2 interest to find out from her whether she had any prior  
3 accidents? Would it be important to your life care plan?

4 A. I did ask the question in my questionnaire whether there  
5 were any prior injuries or illnesses.

6 Q. I'm not talking about injuries. I'm talking about  
7 accidents without injuries.

8 A. The question was whether there were any injuries or medical  
9 conditions that affected her in the past or limited her.

10 Q. In other words, if she would have an accident without any  
11 medical condition resulting from that or any treatment  
12 resulting from that, it would be of no importance. Is this  
13 correct?

14 A. Right. Realistically, she would have answered no to that  
15 question.

16 Q. Therefore, is it fair to say, assuming that she testified  
17 here before, that she had nontreatment for any of her  
18 accidents, fender benders, whatever it was, would it be fair to  
19 say that she signed off on your report truthfully?

20 MR. COFFEY: Objection.

21 THE COURT: Sustained.

22 MR. PLATTA: Thank you, your Honor. I have nothing  
23 further.

24 THE COURT: You're excused. Thank you very much.

25 (Witness excused)

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Kincaid - redirect

1 THE COURT: What's next, Mr. Platta?

2 MR. PLATTA: Your Honor, I request a five-minute  
3 break.

4 THE COURT: Do you have another witness?

5 MR. PLATTA: I may. That's why I'm asking.

6 THE COURT: You decide right now before the break.

7 MR. PLATTA: Your Honor, I'll have to go outside to  
8 check. That's why I'm asking for it.

9 THE COURT: Go outside and check and come back so we  
10 don't wait too long to hear you.

11 MR. PLATTA: Your Honor, I would like to call my next  
12 witness, Dr. Edward Crane. He was outside the courtroom and I  
13 served him with a subpoena.

14 THE COURT: I don't see him on your witness list.

15 MR. PLATTA: He is not on my witness list.

16 THE COURT: Then we are not going to hear from him  
17 unless the defendant doesn't care.

18 MR. COFFEY: He's my witness. I intend to call him.

19 THE COURT: We will let you call him, if you choose,  
20 Mr. Platta, but I think probably it complicates things in terms  
21 of examinations, but go right ahead. You're welcome to call  
22 defense witnesses.

23 MR. PLATTA: Thank you, your Honor.

24 THE COURT: This is the defendants' witness and  
25 provides an opportunity, essentially, for Mr. Platta to ask



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Kincaid - redirect

1 what we call leading questions. Not that he hasn't asked them  
2 all day yesterday and today of his own witnesses, but be that  
3 as it may, the way it's supposed to work is that you don't ask  
4 leading questions of your witnesses and that's sort of a no-no,  
5 but when it comes to defense witnesses or anybody you're  
6 crossing, then it is valuable to sort of reign them in because  
7 you never know what they will say that will hurt you. So  
8 leading questions are permitted.

9 EDWARD CRANE,

10 called as a witness by the Plaintiff,

11 having been duly sworn, testified as follows:

12 DIRECT EXAMINATION

13 BY MR. PLATTA:

14 Q. Good afternoon, Dr. Crane.

15 A. Good afternoon.

16 Q. Doctor, did you meet with Ms. Frometa?

17 A. Yes.

18 Q. How many times?

19 A. Once.

20 Q. When was it?

21 A. March 13, 2008.

22 Q. Did you perform a medical examination?

23 A. Yes.

24 Q. Did you review the MRI films?

25 A. No.

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Crane - direct

1 Q. I'm sorry. You said no?

2 A. That's correct.

3 Q. Did you request MRI films to be delivered to you?

4 A. No. I had received a report from Dr. Rothman who had  
5 reviewed the MRI films, so it wasn't necessary for me to review  
6 them.

7 Q. In other words, you never requested the MRI films for your  
8 own review?

9 A. That is correct.

10 Q. Doctor, is this correct that when you checked my client's  
11 range of motion she complained of mild pain at the extreme  
12 range in each direction? Is this correct?

13 A. On her neck, yes.

14 Q. And how do you define mild pain? How can you assess from  
15 the patient that it's a mild pain?

16 A. That's a complicated question. It's really a function of a  
17 variety of things that you observe or hear. Sometimes the tone  
18 of response, the volume of response, reaction of moving away, a  
19 wincing, and putting all that you see and hear together, one  
20 characterizes a response as whether it was mild or severe.

21 Q. Doctor, did she also complain to you about pressure in her  
22 neck and back when you ask her to walk on the balls of her feet  
23 and then her heels?

24 A. Yes.

25 Q. And you still ask her to do that?

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1 A. When you say still, I didn't ask her to do it but once. So  
2 when she did it she complained that it was pressure in her neck  
3 and back, when she walked on the balls of her feet and heels.  
4 That's not something I ask people to do for any periods of  
5 time. It's a few steps.

6 Q. Doctor, was there a situation during your examination where  
7 you asked my client to sit on the examining table with her  
8 torso and trunk erect and her thighs and calves flat on the  
9 mattress?

10 A. Yes.

11 Q. During this examination, as she was sitting in this  
12 position, did you actually press your hand against her back and  
13 ask her to bend forward?

14 A. No.

15 Q. Did you notice that she had six centimeters' scar on her  
16 back?

17 A. Yes.

18 Q. And, Doctor, did you state in your report that changes in  
19 her spine take at least many months and typically years to  
20 develop?

21 A. That's out of context. I did say that, but it's out of  
22 context.

23 Q. Correct. The context was the actual MRI films -- I'm  
24 sorry -- the actual MRI reports because you didn't review the  
25 films. And you were commenting on the studies that you just

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1 read based on someone else's review. Is this correct?

2 A. Yes.

3 Q. And you also stated that this preexisting condition was not  
4 causally related to the accident, is this correct?

5 A. Yes.

6 Q. Did you state two paragraphs above this one that the  
7 examination of her low back was normal except for the surgical  
8 scar?

9 A. I did.

10 Q. Can you explain for us what kind of condition were you  
11 referring then not being related to the accident if you said  
12 that she has none?

13 A. Could you repeat that?

14 Q. Sure. Could you explain for us what condition did you  
15 refer to if you stated in your report that she has a normal  
16 examination, normal orthopedic examination, and you also stated  
17 that her conditions are not causally related to the accident on  
18 2/14 of '07.

19 A. That's out of context. I can explain it. What I said was,  
20 when I examined her, I found no objective findings whatsoever  
21 in regards her back except for the surgical scar. And then I  
22 said that the MRI that had been done less than a month after  
23 the accident of her low back showed chronic degenerative  
24 changes that take at least months and typically years to  
25 develop and, thus, the changes on the MRI were unrelated to the

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1 accident of February 14 of '07.

2 Q. Doctor, do you agree with me that degeneration could be  
3 asymptomatic?

4 A. Yes.

5 Q. And do you agree with me that an asymptomatic degeneration  
6 could become symptomatic as a result of trauma?

7 A. Theoretically.

8 Q. Yes or no?

9 A. It's possible.

10 Q. Doctor, can you tell us if you reviewed any reports  
11 regarding prior treatment of my client prior to February 14 of  
12 2007?

13 A. No, I did not.

14 Q. Did you request them?

15 A. Not specifically, no, I didn't ask for any records from  
16 prior to the accident date.

17 Q. Do you think it would be important to have them?

18 A. Certainly, if defense counsel had some, they would have  
19 sent them to me. I didn't see any nor did I ask for them. I'm  
20 sure if they had them, they would have sent them to me.

21 Q. I'm sure, too. Does that mean there were none?

22 A. I can't answer that. I didn't see any.

23 Q. Doctor, what is your specialty in orthopedics?

24 A. I do general orthopedic surgery.

25 Q. Did you ever do a surgery that Dr. Babu did in this case?

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Crane - direct

1 A. I haven't done spine surgery for years, but years ago I did  
2 several hundred spine cases.

3 Q. Did you do this specific one ever?

4 A. Certainly.

5 Q. When was the last time?

6 A. I haven't done spine surgery for years. Probably, 15  
7 years.

8 Q. And do you normally review MRIs?

9 A. Sometimes. As part of my practice I see them routinely in  
10 my office practice, but I didn't see them in this particular  
11 case because Dr. Rothman had reviewed them.

12 Q. And, Doctor, do you work solely for defendants or do you  
13 also do work for plaintiffs?

14 A. I've been retained by plaintiffs, but most of the time the  
15 cases that I review are done on behalf of defendants, probably  
16 90 percent.

17 Q. And what is your annual revenue based on this testimony in  
18 court on behalf of defendants?

19 A. I can give you an estimate. I don't know an exact number.

20 Q. Give me your best estimate.

21 A. I testify between once to twice a month, sometimes eight or  
22 ten times a year, sometimes 14 or 16 times a year. And the fee  
23 I charge for my time to come to court is \$5,000. So assuming  
24 12 appearances in a year would be \$60,000. And assuming that  
25 90 percent of those are done on behalf of defendants, 90

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1 percent of that or \$54,000, round numbers.

2 Q. And, Doctor, what about preparation for the testimony, what  
3 about the cost of the report?

4 A. The reports that I generate are billed at \$700, which  
5 includes the examination and the preparation of the report.  
6 And if the records aren't voluminous, it also includes the  
7 record review. If the records are very time consuming, that's  
8 billed at an additional fee.

9 Q. How much?

10 A. \$400 an hour.

11 Q. Can you give me an estimation, based on everything, what  
12 will be the total revenue from the defendants for representing  
13 their clients?

14 A. I don't know. I can't tell you that. I don't know.

15 Q. Is there any reason why you cannot tell us?

16 A. I didn't quite understand your question.

17 Q. I'll repeat that. Doctor, can you give us an estimate of  
18 your annual revenue, based on your testimony, preparation of  
19 reports that you do for defense?

20 THE COURT: I thought he already did that.

21 MR. PLATTA: No, your Honor. I only ask about the  
22 testimony. I'm asking about the total --

23 THE COURT: Why don't we stay with Ms. Frometa.

24 MR. PLATTA: Thank you, your Honor.

25 Q. Doctor, I would like to show you a presentation that was

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1 prepared for this trial. Would you please stand up and show  
2 the jury where Ms. Frometa has a herniated disk in her cervical  
3 spine, please.

4 A. Where she was said to have had a herniated disk in her  
5 cervical spine.

6 Q. You said that you saw the reports of the MRIs, right?

7 A. Yes.

8 Q. Could you show us which level was the herniation on that  
9 these reports indicated?

10 A. It's C3-4.

11 Q. Could you show it to the jury, where it is exactly.

12 A. Well, this isn't clearly identified on the top of this  
13 image. On this particular diagram, this would be C4 over here.  
14 If this is C1, and it probably is, then this would be C3-4 on  
15 the photograph of the MRI image.

16 Q. Thank you. And I will show you also the same depiction of  
17 the lumbosacral spine and I would ask you to identify the  
18 herniated disk there as well.

19 MR. COFFEY: Objection, your Honor.

20 THE COURT: I'll allow it.

21 MR. PLATTA: Thank you.

22 THE COURT: We are not going through all these charts.  
23 Give this your best shot and maybe it will do.

24 MR. PLATTA: Thank you, your Honor.

25 Q. Doctor, could you show the jury where there is an actual



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Crane - direct

1 indication of herniation in this case?

2 MR. COFFEY: Objection.

3 THE COURT: Overruled.

4 A. On which of the pictures?

5 Q. Any of them or all of them.

6 A. Well, the area where she had the surgery was at L5-S1,  
7 which is here. And it's depicted on the diagram here, and you  
8 can't identify this from this picture alone, but this is a disk  
9 space and a disk rather, and this would be suggestive of a very  
10 small herniation if that's L5-S1, which I assume it is.

11 Q. Doctor, what is the dark space on the MRI film depicted on  
12 this presentation on the level of L5-S1?

13 A. I didn't understand your question.

14 Q. Is this a herniated disk?

15 A. I don't understand your question.

16 Q. Doctor, can you show me on the MRI where is the herniation,  
17 where is the actual herniation?

18 MR. COFFEY: Objection.

19 THE COURT: Overruled.

20 A. On this image here there is a small bulge here which one  
21 might characterize as a small herniation. It's not very large.  
22 It's small.

23 Q. Is it rather the bulge or a herniation?

24 A. We have Dr. Rothman here who is a neuroradiologist who is  
25 better equipped than I am to give you a walk-through on this

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1 particular issue.

2 Q. Doctor, are you trying to say that you're not qualified to  
3 read MRI films ever?

4 A. No.

5 MR. COFFEY: Objection.

6 THE COURT: Sustained.

7 Q. Can you please show up on the top of the presentation  
8 herniation of the disk in this case?

9 MR. COFFEY: Objection.

10 THE COURT: Sustained.

11 Q. You may sit. I will use the shadow box.

12 Doctor, are you aware that Ms. Frometa had steroid  
13 injections?

14 A. Yes.

15 Q. Can you tell me when they were done?

16 A. I have to refer to my records.

17 Q. Please do so.

18 THE COURT: I should tell you why he's looking and  
19 I'll charge you about expert testimony, hopefully tomorrow.  
20 But, in any event, experts are not gospel. In other words,  
21 they are just like any other witness. If you don't believe  
22 what they have to say, then you discard their testimony. If in  
23 fact you do believe it, that's supposed to help you reach an  
24 appropriate verdict.

25 A. I have procedure notes from Dr. Davy indicating an epidural

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1 injection on April 26, 2007, May 3, 2007, May 10, 2007.

2 THE COURT: I think there were only three. Don't keep  
3 looking.

4 A. That's it.

5 THE WITNESS: Thank you, your Honor.

6 Q. Did you see that she had any other steroid injections? I'm  
7 asking all the time about lumbar spine. I was asking you about  
8 lumbosacral spine, steroid injections, the one that I presented  
9 for the jury on the presentation.

10 A. You know, I don't remember you saying lumbar, but I'm  
11 looking at the report and it doesn't differentiate in Dr.  
12 Davy's record whether he was doing lumbar or cervical. I'm  
13 missing something. Could you show me because I don't see where  
14 he refers -- yes. I apologize. These were cervical, that's  
15 correct. I have to look for the epidurals in the lumbar spine.

16 THE COURT: Why don't we take a ten-minute recess and  
17 maybe everybody will get their act together before we return.

18 (Jury not present)

19 THE COURT: Mr. Platta, I am delighted to try and  
20 accommodate you. If we are going to have these kind of  
21 hiatuses, if that's a word, it's not going to happen.

22 MR. COFFEY: I would ask the Court to make an in  
23 camera request. Dr. Crane getting put on the stand in that  
24 way, he wasn't on the plaintiff's witness list. He did not  
25 advise us he subpoenaed him. I think he walked out into the

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1 hallway and just subpoenaed him before he came in. I would  
2 just like -- I'd like to know what happened there because I  
3 have to say that's a new one for me.

4 THE COURT: It should have been on the witness list,  
5 but there isn't any doubt that plaintiff can call defendants'  
6 witnesses, the same as they do in --

7 MR. MILLER: Respectfully, your Honor, we would  
8 request --

9 THE COURT: This is not a dog and pony show. If he's  
10 talking, he is the only one talking with respect to this  
11 witness. Similarly, only one person can make objections  
12 happily, the person that does the examination.

13 What would you like --

14 MR. COFFEY: I think he should have to pay the expert  
15 fee.

16 THE COURT: That seems reasonable to me, but why would  
17 that be different from anybody else on anybody else's expert?

18 MR. COFFEY: First of all, Judge, we have a witness  
19 list pursuant to your Honor's rules and we did a pretrial  
20 report with it. My doctor, who did the examination, was not on  
21 that list.

22 THE COURT: What does that have to do with the time  
23 it's taking to get his act together?

24 MR. COFFEY: Secondary issue.

25 THE COURT: I'm only interested in the time to try to

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Crane - direct

1 accommodate you.

2 MR. COFFEY: I brought in all these witnesses to  
3 accommodate the Court.

4 THE COURT: If you want to continue this tomorrow, we  
5 will have no problem.

6 MR. COFFEY: Now I have them all here.

7 THE COURT: If you thought I needed more business, you  
8 should have asked me. Because compounding these or condensing  
9 these witnesses is not making it any easier for me or the jury.  
10 I'm glad to do it for you, but don't think it's my idea because  
11 it's not. I'm glad to do whatever you want with this witness,  
12 but we are not going to move at this continuing pace because  
13 it's not going to get us anywhere. You are going to be paying  
14 for your experts sitting there.

15 What do you think, Mr. Platta, ten minutes enough for  
16 you to finish?

17 MR. PLATTA: If I can ask for a little bit more, yes,  
18 I will finish.

19 THE COURT: 15 minutes. You will take whatever time  
20 you want and we will see what time we are.

21 Juror no. 4 has written the following note: Her  
22 husband called. They have a problem picking up the children.  
23 She has the car with the child seats. So he can't pick them  
24 up. He needs to talk to her.

25 My guess is, if she doesn't work it out we are going

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Crane - direct

1 to have to excuse her and go with what we have got left. If  
2 you have a different view, I'll be glad to listen.

3 MR. COFFEY: Yes, your Honor.

4 MR. PLATTA: Yes, your Honor.

5 THE COURT: Yes, you agree with me, or you have a  
6 different view?

7 MR. COFFEY: I agree.

8 MR. PLATTA: I agree.

9 THE COURT: You can step down for five minutes and we  
10 will come back and hopefully only have a few more minutes of  
11 your testimony, but nobody knows.

12 (Recess)

13 MR. COFFEY: I think your Honor did rule he will be  
14 paying the expert.

15 THE COURT: I rule he has 15 minutes.

16 While we have no jury, let me tell you my plan for  
17 tomorrow. If we finish today, that's a wonderful thing and we  
18 will have a charging conference at 9:30 in the morning. If we  
19 don't finish today, we will have a charging conference at about  
20 11, which is, I assume, the time you need to get finished. In  
21 either event, you boys are on tap for tomorrow morning at 9:30.

22 If you have any charges that I don't have and you  
23 ought to, but don't worry about it, I am going to teach you, as  
24 I suggested, before I bring -- I am going to try and do it. We  
25 will either meet at 9:30 and we are finished here and we will

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1 have the charging conference, or we will go ahead here for an  
2 hour and a half at about 10:30 or 11. We are going to do a  
3 charging conference first in any event. No sense of them  
4 coming and then taking an hour and a half off. I will try and  
5 explain that to them as well.

6 (Jury present)

7 THE COURT: You're still under oath to tell the truth,  
8 Doctor.

9 THE WITNESS: Yes, sir.

10 Q. Doctor, did you have a chance to locate the records?

11 A. I did.

12 Q. Do you have the lumbar sacral description of the  
13 lumbosacral steroid injection?

14 A. I do.

15 Q. Doctor, can you tell me where in your report does it say  
16 that you reviewed this record?

17 A. Just a second.

18 Q. Sure.

19 A. It doesn't. I received those records subsequent to my  
20 report. I received those records with a group of other  
21 additional records that were sent to me in May of 2008.

22 Q. What additional records were sent to you?

23 A. I was sent additional records from Dr. Davy, another report  
24 from Dr. Rothman, the report from life care plan, the report  
25 that Dr. Babu sent to the insurance carrier, Dr. Babu's

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1 curriculum vitae, additional records from Westchester Medical  
2 Care, from the chiropractic office, I mentioned Dr. Davy, and  
3 I'm really sorry because there is so much paper floating around  
4 here I'm trying to keep track of which came when, but I think  
5 those were the materials that I received in May.

6 Q. Doctor, are you aware of the impact, of the force of impact  
7 that created my client's injuries?

8 A. I read some things about it, but to be honest, but I  
9 couldn't focus on that because my -- as I see my role is to  
10 evaluate her and to evaluate the records and see what residuals  
11 she had, if any, from the accident. I did read the EBT  
12 transcript, I read the police accident report, but I don't have  
13 all those details in -- on the top of my tongue.

14 Q. Do you always read police report and deposition transcript  
15 when you treat your patients?

16 A. Do I always read them?

17 Q. Yes.

18 A. Read the patients I see as part of my private practice?

19 Q. That's correct.

20 A. They don't come in with those.

21 Q. If they would have it would you read it?

22 A. I have never had occasion where a patient I'm treating came  
23 in with police accident report or deposition transcript. Would  
24 I read it, no, I don't think I would.

25 Q. And the reason why you paid so much attention to EBT



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Crane - direct

1 transcripts and police reports in this case?

2 A. I didn't say I paid a lot of attention to the police  
3 accident report. And I did read the EBT transcript. Why?  
4 Because it was sent to me and I was asked to read it.

5 Q. Doctor, do you think that history is important for a  
6 patient?

7 A. Sometimes. Sometimes it's very important and many times it  
8 isn't very important at all.

9 Q. Did Ms. Frometa tell you that she was actually working for  
10 two months after the accident?

11 A. Did she tell me personally?

12 Q. Yes.

13 A. Yes.

14 Q. Doctor, would you find important beside reviewing just the  
15 police report and EBT transcript to look at the photos of the  
16 impact that she was involved in? Do you think it would be  
17 important?

18 A. No.

19 Q. I'm sorry, no?

20 A. No.

21 Q. Doctor, I will show you on the screen a procedure that was  
22 done. Did you review the records of this procedure?

23 A. I did.

24 Q. Did you review the films?

25 A. What films?

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Crane - direct

- 1 Q. From this procedure.
- 2 A. What films?
- 3 Q. X-rays.
- 4 A. X-rays?
- 5 Q. Yes.
- 6 A. X-rays from this procedure?
- 7 Q. That's correct. From Cabrini Medical Center.
- 8 A. They don't take x-rays during a procedure like this except
- 9 to localize the level of the surgery, but you don't see any
- 10 part of the surgery on the x-ray.
- 11 Q. That's exactly what I'm referring to. Did you see this
- 12 film?
- 13 A. No.
- 14 Q. Would you think it would be important to see that?
- 15 A. No. Not for me. For the surgeon it would have been very
- 16 important. He has to be at the proper level for the surgery,
- 17 but not for me in reviewing the case, no.
- 18 Q. Well, aren't you evaluating what the surgeon did?
- 19 A. I had no reason to believe that he was at the wrong place,
- 20 if that's what you mean.
- 21 Q. So you basically agreed that he did the right procedure?
- 22 A. No, I didn't say that at all. Actually, I don't understand
- 23 why he did the procedure. He saw her on one occasion, she had
- 24 no objective neurologic findings, she had a very minor
- 25 abnormality on her MRI, so I couldn't say at all that I agree

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Crane - direct

1 with why -- what he did or that he did anything.

2 Q. You just mentioned something interesting. You said you saw  
3 her on one occasion. By the way, how many reports did you see  
4 from Dr. Babu?

5 A. I said he saw her on one occasion prior to the surgery.  
6 That was my understanding. And the records I got from Dr. Babu  
7 were the letter that he wrote to the insurance carrier on April  
8 9, and then a subsequent note that he wrote on February 19,  
9 2008.

10 Q. Anything else?

11 A. Just his operative report and that's all.

12 Q. Do you know that he saw her on a couple of occasions? He  
13 actually testified to seeing her here in court. Don't you  
14 think it would be important for you to review his findings  
15 following his surgery?

16 A. I would have liked to see any records that Dr. Babu had,  
17 and I asked for them.

18 Q. And you asked for them?

19 A. I did.

20 Q. And they were not given to you?

21 A. What was given to me was what I just told you.

22 Q. In other words, you do not have a complete record from Dr.  
23 Babu, is this correct?

24 A. Well, if you're telling me that there is more, then that is  
25 correct. I didn't know what else there was.

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Crane - direct

1 Q. Doctor, I'll show you on your screen the procedure that was  
2 done by Dr. Davy. Did you review anything regarding this  
3 procedure?

4 A. I did.

5 Q. Did you review the films?

6 A. What films?

7 Q. The film -- actually, you're right. You didn't review the  
8 film because Dr. Rothman did. I'm talking about the film  
9 regarding cervical discogram.

10 A. I didn't. Dr. Rothman did.

11 Q. Doctor, did you review records in preparation for this  
12 trial?

13 A. I did.

14 Q. Do you know what is in your reports?

15 A. Well, I can't say I know everything that's in the records.  
16 There are a lot of records, but I read everything that I  
17 thought was important and tried to remember as much as I could.

18 Q. I'm talking about three pages or four pages of your report.

19 A. My report?

20 Q. Yes.

21 A. Oh, sure. Did I read it? Of course, I read it. I read it  
22 several times.

23 Q. I'm just citing things from your report right now.

24 A. Okay.

25 Q. Doctor, are you aware -- I'll withdraw this question.

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Crane - direct

1 Do you know how many times Ms. Frometa had an EMG  
2 done?

3 A. That's not my report. That's someone else's report. Do I  
4 know how many times she had EMGs done? I don't recall. I know  
5 she had -- I know that she had one. I don't know how many more  
6 she had. I don't.

7 Q. If I were to tell you that she had two, would it change, if  
8 anything, of your understanding of the case?

9 A. No.

10 Q. If I were to tell you that the second EMG actually  
11 confirmed the first one after all her surgeries, would it  
12 change any of your opinions?

13 A. It wouldn't change any of my opinions.

14 THE COURT: You have five minutes.

15 Q. But, in fact, you reviewed just one EMG report in this  
16 case. Isn't this correct?

17 A. I can't tell you. I'd have to go through all these papers  
18 to look.

19 Q. Doctor, are you aware that my client had an implant of a  
20 neurostimulator done to her neck or back?

21 A. I recall that. I don't remember the details, no.

22 Q. Can you show me in your report a place where you have any  
23 mentioning about this procedure?

24 A. No. I did not mention it in my report.

25 Q. Do you know when it was done?

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Crane - direct

- 1 A. No.
- 2 Q. Any of them?
- 3 A. No.
- 4 Q. Do you have any records regarding this procedure?
- 5 A. As I said, I have to look for them. Do you want me to do
- 6 that?
- 7 Q. No. Thank you, you don't have to.
- 8 Doctor, did you ever implant -- do an implant of a
- 9 neurostimulator?
- 10 A. No, I haven't.
- 11 Q. Did you ever do steroid injection?
- 12 A. Epidural steroid injections?
- 13 Q. Yes.
- 14 A. No, I haven't.
- 15 Q. Did you ever do facet nerve injection?
- 16 A. Nope.
- 17 Q. Did you ever do percutaneous discectomy?
- 18 A. I have done open discectomies. Percutaneous with a striker
- 19 device?
- 20 Q. Yes.
- 21 A. No one I know does that.
- 22 Q. Did you do that?
- 23 A. No.
- 24 Q. Are you specializing in spinal surgeries or general
- 25 surgeries?

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Crane - direct

1 A. I don't specialize in general surgery. I specialize in  
2 orthopedic surgery. Within the field of orthopedic surgery, I  
3 do general orthopedic surgery.

4 Q. Which means, for example, what kind of surgeries?

5 A. The surgeries I've done over the last ten years have been  
6 primarily upper extremity surgery, knee surgery, foot surgery,  
7 ankle surgery, fracture surgery, hip surgery; not spine  
8 surgery, not neck surgery, not hand surgery, although I've done  
9 lots of hand surgery in the past.

10 Q. And you understand that you were referred in this case by  
11 defendants and paid whatever money to testify as a spinal  
12 specialist?

13 A. No. I was retained to render an opinion as to her  
14 condition as an orthopedic surgeon. Orthopedic surgery --  
15 certainly every orthopedic surgeon treats patients with spinal  
16 injuries and problems on a routine basis, not as a spinal  
17 specialist per se, no.

18 Q. But you were retained to review the records of a  
19 neurosurgeon who does only spinal surgeries, am I correct?

20 A. Does he only do spinal surgery or does he do brain surgery  
21 as well?

22 Q. He definitely did the spinal surgery here, didn't he,  
23 Doctor?

24 A. Are you talking about Dr. Babu?

25 Q. That is exactly who I am talking about.

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Crane - direct

1 A. You're not talking about Dr. Davy because he's not a  
2 neurosurgeon.

3 Q. I'm talking about Dr. Babu.

4 A. I don't know whether Dr. Babu just does spinal surgery.  
5 Some neurosurgeons just do brain surgery, some do peripheral  
6 nerve surgery, some do a lot of back, some do no backs.

7 Q. You know what kind of surgery he did in this case, right?

8 A. I know what he did, yes.

9 Q. He was a spinal surgeon, right?

10 A. Yes, of course.

11 THE COURT: I think that's it. This was an agreement  
12 that we made that there would be 15 minutes more of whatever  
13 you want to call this, direct or cross. It's now Mr. Coffey's  
14 turn.

15 MR. PLATTA: Thank you, your Honor.

16 CROSS-EXAMINATION

17 BY MR. COFFEY:

18 Q. Good afternoon, Doctor.

19 A. Good afternoon.

20 Q. At my request did you examine Adonna Frometa?

21 A. I did.

22 Q. Tell us a little bit quickly -- we have the CV in the  
23 records already. Tell us about your educational background,  
24 where you have privileges and if you're board certified.

25 A. I received my MD degree from New York Medical College. I



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Crane - cross

1 spent the next five years after medical school at Lenox Hill  
2 Hospital in training the first year as an intern, the second  
3 year as a resident in general surgery, and the next three years  
4 as a resident in orthopedic surgery, orthopedic surgery being  
5 the specialty of medicine that deals with the diagnosis and  
6 treatment, both surgical and nonsurgical treatment of disorders  
7 and injuries to the spine, arms, bones, tendons, joints, and so  
8 forth. I finished my residency in 1971 and spent the next two  
9 years in the air force as an orthopedic surgeon. I took my  
10 examinations from the American Board of Orthopedic Surgery in  
11 1972 and passed those examinations and was certified as a  
12 diplomate of the American Board of Orthopedic Surgery which  
13 means you're board certified in that specialty.

14 I've been on the staff at Lenox Hill Hospital since  
15 1971. I'm attending orthopedic surgeon there. I'm a member of  
16 a variety of organizations, including American College of  
17 Surgeons, the American College of Orthopedic Surgeons, the  
18 American Board of Orthopedic Surgeons, New York State Society  
19 of Orthopedic Surgeons, and so forth. Over the years I have  
20 headed up the general orthopedic section of our residency  
21 training program, involved in our residency training and so  
22 forth.

23 THE COURT: I think that's enough for me.

24 MR. COFFEY: I would offer him as an expert, your  
25 Honor.

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Crane - cross

1 THE COURT: Any objection?

2 MR. PLATTA: No, your Honor. Beside what I stated  
3 before.

4 THE COURT: You're an expert.

5 Q. Now, did we retain you to perform an examination?

6 A. Yes.

7 Q. And when did you do that examination?

8 A. March 13, 2008.

9 Q. And did you take a history from Ms. Frometa?

10 A. Only insofar as asking her what complaints or problems she  
11 still had from the accident of February 14, 2007, as well as  
12 her other surgical and medical history.

13 Q. Did she tell you about any other motor vehicle accidents?

14 A. She didn't. I asked her if she had ever had any problems  
15 with or any injury to her neck or any part of her back before  
16 the accident of February 14, 2007, and she said she didn't.

17 Q. So you had no reason to try to inquire if there were any  
18 other medical records, is that correct?

19 A. That's correct.

20 Q. And then what did your examination consist of?

21 A. Initially, asking her what complaints or problems she had  
22 from the accident in February '07 and taking down those  
23 comments. And then performing physical examination focusing on  
24 the orthopedic areas that were allegedly injured in the  
25 accident of February 14, '07, specifically her neck and back.

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Crane - cross

1 Q. And specifically when you did the examination, tell the  
2 jury what you did to perform -- before I get to that, what's  
3 the purpose of the examination?

4 A. Well, it was to review the records, to do the examination,  
5 and then to issue a report to you as to what my findings were  
6 in terms of what, if any, residuals she had from the accident  
7 of February '07 and what her prognosis might be and whether he  
8 needed any further treatment resulting from that accident.

9 Q. And about how long did that examination take?

10 A. I made a note at the time and it took 52 minutes.

11 Q. And what did you -- you've already talked about your  
12 records and what you've reviewed. Specifically, what did you  
13 do in the examination that would be of relevance to the jury?

14 A. The first part that I examined was her neck. And I asked  
15 her to move her head in various directions. And she showed me  
16 that she had full motion of her neck, and I won't give the jury  
17 the degrees of motion, unless you wish me to, but she moved it  
18 fully and normally, but she moved her head very slowly when I  
19 asked her to show me to move it. She moved it hesitantly and  
20 she complained of pain at the end of range.

21 Once that part of the examination was over she moved  
22 her head freely and rapidly in each direction without any  
23 hesitation. So the only time that she hesitated and moved it  
24 slowly was when I had asked her to show me how far it moved.  
25 And as she moved it she said, do you hear it cracking, and I

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Crane - cross

1 didn't. So I put my hand over the back of her neck and asked  
2 her to move it again in different directions, and I neither  
3 heard any cracking or felt any. The pertinent parts, I  
4 examined her arms and measured the circumference of her arms.

5 And one of the things that I try to do when I do an  
6 examination like that is to try to see whether there are  
7 objective findings that either substantiate or don't  
8 substantiate her complaints. And an objective finding is  
9 something that I can see that I can measure or that I can  
10 visualize that's there and a subjective complaint is something  
11 that they complain about. For example, if someone goes to a  
12 doctor and complains of an itch, that's a subjective complaint.  
13 And if they -- if the doctor examines them and finds a rash,  
14 then that's an objective finding that explains the complaint.

15 So one of the things that I tried to do was to see if  
16 there were any objective findings in her examination that would  
17 explain her pain and or substantiate it one way or the other,  
18 whether she had a problem. So I measured the circumference of  
19 her arms at different levels to see whether one side was larger  
20 than the others because atrophy of the muscles is something we  
21 see when there is nerve damage or pinched nerve or herniated  
22 disk. In fact, I found her right arm to be very slightly  
23 larger than her left, which is what we would expect because she  
24 is right-handed. I asked her whether she was right or  
25 left-handed and she told me she was right-handed.

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Crane - cross

1           Objectively, I found no atrophy of either arm. I  
2   tested the reflexes of her arms, tapping her arms in different  
3   locations with a soft rubber hammer, and that's another  
4   objective finding. If there is pressure on the nerve and the  
5   neck, we will typically see a reflex that's different from one  
6   side to the other because of that pressure. The signal isn't  
7   getting to that tendon, to that reflex properly because of  
8   pressure and it wasn't the case either. Her reflexes were  
9   perfectly normal.

10           Then I tested her strength in her arms and, again, the  
11   nerves from the neck give signals to the muscles to contract,  
12   and if there is pressure on a nerve you'll typically get  
13   weakness in certain muscle groups and I found none. She had  
14   normal sensation. I tested her touching her very lightly with  
15   a pin to see whether she had any loss of sensation in her arms  
16   and that's another objective test. But you see with sensation  
17   the nerves from the neck each have a particular assignment, a  
18   specific area where they give sensation to. For example, the  
19   C5 nerve root gives sensation to the radio side of the forearm  
20   here and the C6 nerve root to the thumb and index finger.  
21   These have all been mapped out. If there is pressure on a  
22   nerve you'll see a specific area where there is a loss of  
23   sensation and everything else will be normal. In her case, she  
24   had a decreased response to pain in the entire right arm, the  
25   whole arm from shoulder to fingers. In order to have that

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Crane - cross

1 she -- one would have to have had a catastrophic crushing  
2 injury to the spinal cord which obviously didn't happen. So  
3 that didn't make any sense. It was an inconsistent finding and  
4 it wasn't believable.

5 I asked her to walk, and she did. She had a  
6 subjective complaint of pressure in her neck and lower back,  
7 but she was able to walk normally and without a limp. As we  
8 mentioned before, she could walk on the balls of her feet and  
9 not her heels, which shows a certain amount of strength in  
10 certain muscle groups in the legs, and that was not a problem  
11 except for her subjective complaint of pressure. And then I  
12 asked her to bend forward at her waist. She stood up with her  
13 knees straight and I asked her to bend forward at her waist  
14 this way as far as she could. She then bent forward to 45  
15 degrees, about this far forward, and stopped and I said, what's  
16 the matter, and she complained of severe pain in her lower back  
17 and said she couldn't bend any further.

18 But a short time afterwards I asked her to sit up on  
19 the examining table and she did and I asked her if she could  
20 put her legs up on the table and she did and she sat  
21 comfortably with her torso and her trunk erect, vertical, and  
22 her thighs and calves flat on the mattress stretched out in  
23 front of her and she sat very comfortably in that position. As  
24 a matter of fact, as she sat there, she herself leaned forward  
25 even further creating an angle between her thighs and her trunk

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Crane - cross

1 of 110 degrees and she sat there and I said, does that bother  
2 you? Do you have any discomfort or pain? And she said she  
3 didn't. That showed me that she really had a normal -- she was  
4 quite flexible and she had the ability to bend at her waist  
5 painlessly to 110 degrees as opposed to what she had shown me a  
6 few minutes later when she went forward to just 45 degrees and  
7 said she couldn't go any further. It was not consistent, nor  
8 was her complaint believable.

9 She had some mild tenderness in her lower back, but no  
10 spasm. Again, the tenderness being a subjective complaint,  
11 spasm being an objective finding. She did have the scar, which  
12 was two and a half inches in length, which was fine and flat.  
13 I measured the circumference at her legs at different levels to  
14 see if she had any atrophy of her legs, and she didn't. The  
15 legs were equal in size. The reflexes in her legs were normal,  
16 the strength in her legs was normal, and her sensory exam in  
17 her legs with the pin, she said her whole right leg was numb.  
18 As a matter of fact, not only did she say her whole right arm  
19 and right leg were numb, but she said that the right sides of  
20 her face was numb, the right side of her scalp was numb, the  
21 right side of her upper back was numb, and none of that made  
22 any neurologic sense, and it wasn't believable.

23 That really was the sum and substance of the important  
24 parts of the examination. I examined her right hip, which was  
25 normal, and her right knee was normal.

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Crane - cross

1 Q. And then, Doctor, you were talking earlier about the  
2 difference between -- you've done open disk versus percutaneous  
3 disk with a striker device. What's open disk surgery?

4 A. The vast majority of the surgery that's done on lower backs  
5 is done open. There are some modifications of that. There is  
6 microdiscectomy which is done with a microscope and there is  
7 some experimental work done with arthroscopic or laparoscopic  
8 equipment, but it is all basically, you make a decision and you  
9 remove the disk piecemeal mechanically. The device that Dr.  
10 Davy uses, I think he's the only person I have ever seen who  
11 uses it. I have seen other cases where he has used it. It's  
12 not accepted. We have this the main stream of orthopedic care,  
13 we have enormous spine surgery service at Lenox Hill Hospital.  
14 The machine isn't owned by the hospital and no one does it.  
15 It's not of any value. It doesn't provide any value to the  
16 patient.

17 Q. How long have you been at Lenox Hill?

18 A. Since 1966.

19 Q. And when you talk about, you commented about Dr. Babu's  
20 surgery, why did you not believe it was indicated based on the  
21 records?

22 A. Well, I wouldn't say that. I just say that the records  
23 don't -- I don't see why he did it. I'm not saying -- I  
24 certainly would say that about Dr. Davy's procedure because it  
25 has no value. Dr. Babu, from the records that I received, saw



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Crane - cross

1 her on one occasion. The report that he sent to the insurance  
2 carrier describes no objective findings whatsoever. And the  
3 basis for the surgery that was done was he commented that the  
4 straight leg raising test was positive, which is a subjective  
5 test, and he also based it on an MRI, which shows a very small  
6 disk herniation that doesn't press on any nerves, doesn't press  
7 any nerve structures. So I think it was -- I don't understand  
8 why he did it, but what he did was -- the procedure that he  
9 did, however, was in the mainstream of medical care.

10 Q. Now, I just want to show you, here is the records that are  
11 in my possession. I want to ask if they are any different from  
12 what you have from Dr. Babu.

13 MR. PLATTA: Objection, your Honor.

14 THE COURT: Overruled.

15 A. That's what I have as well.

16 Q. Now, did you come to any conclusions with reasonable  
17 degrees of medical certainty and, if so, what were they,  
18 Doctor?

19 A. I came to a conclusion that there was no causal relation  
20 between the accident of February 14, 2007 and her lower back  
21 condition. Based on the materials that I have reviewed,  
22 including the emergency room record, where they didn't even --  
23 they made no findings in terms of her back at all. Her back  
24 wasn't even x-rayed. And the MRI findings, which were minor  
25 and the x-ray changes which indicated a chronic preexisting

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Crane - cross

1 condition.

2 Q. What does a chronic preexisting condition mean?

3 A. That it had been there for a considerable period of time  
4 prior to the accident of February 14, 2007.

5 Q. And is it your opinion, did the plaintiff permanently lose  
6 the total use of the spine?

7 A. No.

8 Q. Did the plaintiff sustain a significant limitation of the  
9 use of a body function or system?

10 A. No.

11 Q. Was the plaintiff -- I want also to ask you a hypothetical.  
12 I want you to assume that the plaintiff worked following the  
13 accident without limitations. Was she, in your opinion, able  
14 to perform her usual and customary activities following this  
15 accident?

16 A. Yes.

17 Q. Doctor, I have no further questions. Thank you very much.

18 THE COURT: We will give you a few minutes, if you  
19 want them, Mr. Frometa, but we are planning to move right  
20 along, as you have agreed to do as well.

21 MR. PLATTA: Your Honor, thank you. I will not use  
22 more time than defendants takes on my experts.

23 THE COURT: I don't know what that means. Why don't  
24 we be clear. You have 15 minutes.

25 MR. PLATTA: Thank you, your Honor.

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Crane - cross

1 REDIRECT EXAMINATION

2 BY MR. PLATTA:

3 Q. Doctor, you mentioned something about striker device,  
4 right?

5 A. Yes.

6 Q. Do you know if striker device is FDA approved?

7 A. No.

8 Q. It's not?

9 A. It isn't.

10 Q. I'm asking you. Do you know?

11 A. I said no.

12 Q. You don't know, right?

13 A. I don't know.

14 Q. If I tell you that it actually is, would it change your  
15 opinion as to the necessity or actual -- not necessity, as to  
16 the use by Dr. Davy of this device in his treatment?

17 A. Not at all. The fact that the FDA approved something  
18 doesn't necessarily mean that it has any value except to the  
19 surgeon who is performing the procedure. If the striker device  
20 was such a good device and it was a way of performing a  
21 discectomy and being paid a fee for performing a discectomy in  
22 a brief period of time without any incision, then the 15 or so  
23 spine surgeons in my hospital, one of them would be using it.  
24 They are not using it because it is felt in the medical  
25 community not to be of any value to your patient.

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Crane - redirect

1 Q. And, Doctor, as you said, you're not in pain management,  
2 right?

3 A. I didn't say that, but I'm not a pain management doctor,  
4 that's correct.

5 Q. Do you know what specialty Dr. Davy is?

6 A. I saw his letterhead. It's said anesthesiology and pain  
7 management, but I couldn't know what his credentials are.

8 Q. But you're not a specialist in any one of those two?

9 A. I didn't say I was.

10 Q. Did you ever see a report prepared on behalf of defendants  
11 in this case from an anesthesiologist or pain management  
12 doctor?

13 A. No.

14 Q. Did you ask for such review?

15 A. No.

16 Q. Doctor, you said that all these injuries are preexisting.  
17 This is based on any records that you reviewed?

18 A. No.

19 Q. Is this based on the information that you got from the  
20 defendants?

21 A. Wait a second. I never said all of these injuries are  
22 preexisting. That's out of context. I said that the changes  
23 that were seen on the MRI and the changes seen on the x-ray of  
24 the lumbar spine done shortly after the accident were  
25 preexisting. I don't see any issue of any pathology in her

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Crane - redirect

1 neck, so I didn't say it was preexisting or not preexisting.  
2 Her neck, as far as I'm concerned, was fine, but she did have  
3 some degenerative changes in her lower back which were  
4 preexisting. And the basis for that is not any medical records  
5 that I received, but, rather, the character of the changes seen  
6 on the studies done shortly after the accident.

7 Q. You did not review the studies, right?

8 A. That's what I said, yes.

9 Q. So you're talking about something that someone else did;  
10 for example, Dr. Babu; for example, Dr. Krishna, am I correct?

11 MR. COFFEY: Objection.

12 THE COURT: If you understand the question, you can  
13 answer it. If you don't, maybe he will go on to something  
14 else.

15 A. I really don't understand. It was on the basis of  
16 Dr. Rothman's review, not Dr. Krishna or Dr. Babu's.

17 Q. I understand. I'm just saying you did not review the films  
18 that the neurosurgeon reviewed in order to operate on this  
19 patient?

20 A. Did he review the films?

21 Q. He reviewed the films. You didn't review the films.

22 MR. COFFEY: Objection.

23 THE COURT: Overruled.

24 A. I don't know. In his letter to Geico he said that the MRIs  
25 showed a disk herniation, but he didn't -- I didn't see it in

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Crane - redirect

1 that report where it says that he actually reviewed the films  
2 himself. Does it say that?

3 Q. Doctor, he was here testifying. He did review the records,  
4 he did review the films.

5 MR. COFFEY: Objection.

6 THE COURT: Sustained. The jury has a little role  
7 here, believe it or not.

8 Q. Doctor, were the records that you have in front of you sent  
9 to you before the exam? Did you request them, or they were  
10 just sent to you?

11 A. Which ones?

12 Q. The medical records of Ms. Frometa.

13 MR. COFFEY: Objection.

14 THE COURT: I'll let you answer. It seems to me we  
15 have this information before, but go ahead.

16 A. The records that were sent to me prior to the examination  
17 was sent to me by Wilson Elser firm that retained me to do the  
18 exam. The records that were sent to me subsequent to that  
19 were, I assume, in part, are a response to my request for  
20 records of Dr. Babu. When I received those additional records  
21 in May 2008, they came along with a number of other medical  
22 records beyond what I had requested.

23 Q. At any time, any orders from prior treatment, prior to  
24 February 14 of '07?

25 A. No.

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Crane - redirect

1 Q. By the way, how did you check the range of motion for my  
2 client?

3 A. Of which part?

4 Q. Cervical spine.

5 A. Cervical spine is done visually.

6 Q. So that means you did not use a goniometer?

7 A. You really can't. Have you ever seen a goniometer?

8 Q. Yes.

9 A. Would you do that with a cervical spine?

10 Q. Doctor, this is me asking you questions.

11 A. There are some -- goniometer is a plastic device. It's  
12 nothing fancy. It might be something you remember with --  
13 something like you remember from geometry and it just measures  
14 angles and it's easy to use. When you want to measure motion  
15 at an elbow, you just put one line here and one line here and  
16 you go measure it. Range of motion to the elbow or the wrist.  
17 I use them routinely, the goniometer, to measure range of  
18 motion, for example, at the elbow or the wrist or the knee.

19 But with the neck, if one were to turn their head to  
20 the right, you'd have to get up on top over their heads and put  
21 one line this way, one line that way, and really, when you're  
22 doing orthopedics for a long time, you get very good at  
23 estimating the angles, particularly when you're measuring the  
24 neck. For example, looking straight ahead at zero, if I turn  
25 my head halfway, it's 45 degrees. If I could go to 90, it

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Crane - redirect

- 1 would be -- we get pretty good at being rather accurate at  
2 that. I can't say it's exact, but it's the best you can do.  
3 You can't measure a neck practically with a goniometer.  
4 Q. Did you say it was not exact?  
5 A. You can't measure the neck range, the motion with a  
6 goniometer.  
7 Q. The way you did it, is it exact?  
8 A. Of course not. These examinations aren't -- many parts of  
9 them aren't exact, but they are very close and I try to be as  
10 accurate as I can be.  
11 Q. Can you tell me if this test is an objective or subjective  
12 test?  
13 A. What test?  
14 Q. Range of motion test.  
15 A. From my standpoint, I write down what I measure. Sometimes  
16 someone that you examine doesn't show you full range of motion  
17 because they don't want to or because they are hurting or  
18 because they are trying to show you less. So from the  
19 standpoint of what a patient shows me in range of motion, it's  
20 a combination of subjective and objective. From the standpoint  
21 of what I try to do when I examine, I try to be as objective as  
22 I can, and I measure as best I can either visually or with the  
23 goniometer.  
24 Q. Just so we understand, is it objective or subjective?  
25 A. Is what?



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Crane - redirect

1 Q. The test that you did.

2 A. The range of motion of her neck?

3 Q. Yes.

4 A. I don't think I can answer it any better than I just did.

5 What I measure, I measure as objectively as I can and as  
6 accurately as I can. She showed me full range of motion, so I  
7 have no reason to think that she was coloring her range of  
8 motion part of her exam.

9 Q. Doctor, what you're saying is basically that range of  
10 motion test is an objective test, am I correct?

11 A. In this case, yes. Not in many other cases, it isn't.  
12 Sometimes I'll see someone and ask them to move their head to  
13 the right and they barely move it. And then five minutes later  
14 I'll be tapping on their arm with a rubber hammer and they will  
15 turn their head to the right 70 degrees. In that case it's not  
16 purely objective. In this particular case, on that particular  
17 part of the examination, it was objective.

18 Q. Doctor, do you agree with Dr. Rothman's findings? I'm  
19 talking about the other defense doctor who reviewed the MRI  
20 films.

21 MR. COFFEY: Objection.

22 THE COURT: Sustained.

23 Q. Doctor, do you agree with Dr. Rothman's findings?

24 MR. COFFEY: Objection.

25 THE COURT: Sustained.

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Crane - redirect

1 Q. Doctor, do you have any different opinion regarding  
2 Ms. Frometa's spinal condition than Dr. Rothman?

3 MR. COFFEY: Objection.

4 THE COURT: I think we will let Rothman speak for  
5 himself.

6 MR. PLATTA: I just want to find out if this is  
7 inconsistent with Dr. Crane.

8 THE COURT: I don't.

9 Q. Doctor, just so I understand, what you basically are trying  
10 to say, and tell me if I'm wrong, that all the surgeries, the  
11 spinal for the neck, for the back, steroid injections, facet  
12 nerve injections, as well as spinal, number, and cervical nerve  
13 stimulator implants were not the right way to go for  
14 Ms. Frometa?

15 MR. COFFEY: Objection.

16 THE COURT: Sustained.

17 Q. Doctor, you mentioned that this kind of treatment would  
18 result from some kind of catastrophic injuries to the spine,  
19 correct?

20 A. What?

21 Q. In your earlier testimony today you said that such injuries  
22 to the spine could only be from catastrophic injuries to the  
23 spine.

24 A. I never have seen any patient, no matter how badly injured,  
25 no matter what the nature of their spinal cord injury was, to

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Crane - redirect

1 have the pattern where the right side of their body only was  
2 numb. It's not possible.

3 Q. If you look at your screen right now --

4 MR. COFFEY: Objection.

5 THE COURT: I haven't heard the question yet. Is  
6 there a question? Overruled.

7 Q. Doctor, please look at the picture. This is a picture of  
8 the impact that was done to my client's vehicle. Would it  
9 change anything in your diagnosis or thoughts about this case,  
10 procedures, surgeries, injections, if you had seen this picture  
11 before?

12 A. No.

13 MR. PLATTA: Thank you, Doctor.

14 THE COURT: Anything? You're excused. Thank you very  
15 much.

16 (Witness excused)

17 THE COURT: What's next, Mr. Platta?

18 MR. PLATTA: Your Honor, I would like to call my  
19 client as a rebuttal witness.

20 THE COURT: We don't have rebuttal yet. You can have  
21 rebuttal at the end of the case. Otherwise, you have another  
22 witness?

23 MR. PLATTA: No, your Honor.

24 THE COURT: Is it fair to say -- I don't know why I'm  
25 doing all this -- that the plaintiff rests?

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1 MR. PLATTA: That is correct, Judge.

2 THE COURT: Do you have a case, Mr. Coffey? If you  
3 do, you better start it soon.

4 MR. COFFEY: Yes, your Honor. I would like to reserve  
5 until out of the jury's presence to make any motions.

6 THE COURT: Let me explain to you or take a little  
7 more time. What I do is, I presume that all the motions that  
8 could be made under the federal rules, may come as a surprise  
9 to you, under the federal rules, are being made, have been  
10 made, and I reserve decision.

11 MR. COFFEY: Thank you, your Honor.

12 At this time I would call Dr. Lewis Rothman to the  
13 stand.

14 THE COURT: I'm trying to move this along. Call her.  
15 We will do the rebuttal now. Maybe it will help.

16 MR. PLATTA: Sure.

17 THE COURT: I am talk talking to you, Mr. Platta.  
18 Keep in mind that rebuttal testimony is a rare bird, not that  
19 we haven't seen a flock of rare birds here.

20 You're still under oath to tell the truth.

21 ADONNA FROMETA, recalled.

22 DIRECT EXAMINATION

23 BY MR. PLATTA:

24 Q. Ms. Frometa, do you remember being examined by Dr. Edward  
25 Crane on March 13, 2008?

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Frometa - direct

1 A. Yes.

2 Q. Could you describe to the jury the way he examined you when  
3 you were sitting on a table with your legs up, what happened  
4 then?

5 MR. COFFEY: Objection.

6 A. He told me to sit down.

7 THE COURT: Sustained. This is not rebuttal testimony  
8 in my view, so I'm not allowing it. Have you got another  
9 question?

10 Q. Ms. Frometa, was there at any point a body contact between  
11 you and Dr. Crane?

12 MR. COFFEY: Objection.

13 A. Yes.

14 THE COURT: This is a fun question. You answered  
15 what?

16 THE WITNESS: Yes.

17 THE COURT: What kind of contact was there?

18 THE WITNESS: He pushed me when I was on the table and  
19 he went like this and I said ouch, that hurts, don't push me,  
20 please.

21 Q. Was it when you were actually sitting with your legs out?

22 A. Yes.

23 THE COURT: Didn't you have the opportunity to ask  
24 about this doctor's examination when you had her on direct?

25 MR. PLATTA: I'm sorry, Judge, no.

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Frometa - direct

1 THE COURT: No, you didn't have that opportunity?

2 Somebody took it away from you?

3 MR. PLATTA: No --

4 THE COURT: The problem is, it's really not rebuttal.

5 Do you have a couple more questions? We will listen to them.

6 MR. PLATTA: Your Honor, I'm done. Thank you very  
7 much.

8 THE COURT: Thank you very much.

9 (Witness excused)

10 THE COURT: We got your doctor coming?

11 MR. COFFEY: Yes.

12 LEWIS ROTHMAN,

13 called as a witness by the Defendants,

14 having been duly sworn, testified as follows:

15 DIRECT EXAMINATION

16 BY MR. COFFEY:

17 Q. Good afternoon, Dr. Rothman.

18 A. Good afternoon.

19 Q. Tell us a little bit about your educational background,  
20 where you're board certified, and where you're on staff at any  
21 hospitals.

22 A. Starting from when?

23 Q. Let's keep it until we decide you're deemed to be an  
24 expert.

25 A. Education, how far back?

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Rothman - direct

1 Q. Tell me about your medical degree, undergraduate degree.

2 THE COURT: I don't care about undergraduate degree.

3 MR. PLATTA: Your Honor, I will stipulate that  
4 Dr. Rothman is an expert.

5 THE COURT: That's good enough for me.

6 Q. Doctor, you're board certified in radiology?

7 A. I am.

8 Q. What is radiology?

9 A. Radiology is a subspecialty of medicine that deals -- first  
10 of all, it's broken up into two areas, diagnostic radiology and  
11 therapeutic radiology, or radiation oncology. My area of  
12 expertise or my training was in diagnostic radiology, which  
13 uses x-rays, CAT scans, MRI scans, sonography and even  
14 radioactive materials to diagnose conditions that affect the  
15 body. I have a subspecialty in neuroradiology which deals with  
16 diagnosing conditions that affect primarily the brain, the  
17 spine, and peripheral nervous system.

18 Q. Now, with the subspecialty, just explain a little the  
19 difference between the qualification of a radiologist and say a  
20 neurologist or an orthopedist to review films.

21 A. Well, radiologists are trained to review films and that's  
22 basically what we do day in and day out. In order to become  
23 board certified in radiology you need to complete an accredited  
24 radiology residency program which, when I did it back in the  
25 '60s, was three years. It's now four years. We have to take a

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1 written exam and then an oral examination. If you pass both of  
2 those examinations you're deemed board certified by the  
3 American Board of Radiology.

4 In 1995, that board instituted something called a  
5 certificate of added qualifications in several areas, one of  
6 them being neuroradiology, which is now a subspecialty and then  
7 a specialty. You had to have been trained in the field and  
8 practicing a minimum of 50 percent of your time in  
9 neuroradiology to be eligible to sit for the examination. I  
10 sat for that examination and received what's called a  
11 certificate of added qualifications in neuroradiology.

12 Getting back to orthopedic surgeons and neurologists  
13 during the course of their work, they do look at imaging  
14 studies and some of them are more expert than others in terms  
15 of reviewing and interpreting them, but they don't do it day in  
16 or day out, and they are not specifically certified, certainly  
17 not by the American Board of Radiology.

18 Q. How about versus neurologist?

19 A. Neurologist the same way. I trained as a neurologist. I  
20 actually trained as a neurologist, got my interest in  
21 neuroradiology during that training, and was exposed and  
22 performed and interpreted various neuroradiological procedures.  
23 But, again, not on a day in and day out basis the way a  
24 radiologist would.

25 Q. Now, are you also currently a professor of clinical



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1 radiology?

2 A. I'm a professor of diagnostic radiology at Westchester  
3 County Medical Center.

4 Q. Now, with regards to this case, at some point -- we have a  
5 shadow box over there. Your CV is part of the record. We  
6 don't have to go through everything that's in it. We just  
7 wanted you to know that. I am going to show you some films. I  
8 want you to start talking about what you think is important.  
9 There is a shadow box there if that will assist you, Doctor.

10 A. Sure. I think it ought to be up there because the jury  
11 will be able to see it closer.

12 MR. COFFEY: Judge, can I move it on top of the edge  
13 of the jury box?

14 THE COURT: Yes.

15 I'm changing my mind. I don't want it there. If you  
16 put it on the jury rail, you would probably be in the box by  
17 now.

18 Q. At some point, Doctor, we sent you some x-rays and MRI  
19 scans from Adonna Frometa to review, is that correct?

20 A. Yes, you it.

21 Q. Why don't you tell the jury what you reviewed and what  
22 their relevance is.

23 A. I reviewed MRI scans of the cervical spine. That's the  
24 neck and the lumbar spine, the low back. I'm putting up films  
25 from the cervical spine first. We normally do these films in

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1 what we call the sagittal or side view and axial or horizontal  
2 view when we look at them.

3 The first set that I've put up are sagittal or side  
4 views, and if you can imagine that I'm the patient for the  
5 moment and you're looking at a series of slices that go through  
6 my spine from one side to the other, this is a side view so  
7 that one slice starts over here and then we go and move  
8 steadily in about quarter of an inch increments from one side  
9 to the other.

10 The top of the patient is at the top of each one of  
11 these slices and the slices go from the upper left-hand corner  
12 to the lower right-hand corner. You can see a little bit of  
13 the jaw over here, to orient you, and a little bit of the upper  
14 chest down here.

15 If we look at the third row, we see views that go  
16 through more or less the center of the spine. You may be able  
17 to see from back there. I don't think you're going to be able  
18 to see it from all the way in the back --

19 THE COURT: You're welcome to move over and go into a  
20 back row if you can't see what he's doing.

21 A. There are several square structures here that represent the  
22 vertebra or the bony supports to the spine. And in between  
23 them there are horizontal flat structures that represent the  
24 disks, the intervertebral disks. Behind those structures is a  
25 dark area that's coming down that represent the spinal cord.

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Rothman - direct

1 The spinal cord is what conducts all of the nerves from the  
2 brain through the body to ultimately go out to the extremities,  
3 the abdomen, et cetera.

4 And what we look at normally in these particular cases  
5 is we look to see whether or not the disks are normal. Do they  
6 have their normal signal appearance, are they sticking out, are  
7 they herniated? Are they degenerated? Is there any pressure  
8 on the spinal cord? Is there any pressure on any of the nerve  
9 roots? What we see in this particular case is we see some very  
10 minor bone spurs or dried-out disks that we call osteophytes at  
11 a couple of levels, at the highest level between C2 and C3 and  
12 between C4 and C5. You see a very small disk herniation at the  
13 C3-4 level.

14 Now, in order to evaluate this disk herniation more  
15 completely, we have to do what's called a horizontal or axial  
16 view, and this sheet of film shows us an axial view. And try  
17 to imagine me suspended in midair with my feet towards you and  
18 a series of views going this way instead of this way through  
19 the cervical spine. So that's what we have here. Again, going  
20 from the upper left-hand corner to the lower right-hand corner,  
21 and those of you who are up front may be able to see lines on  
22 this one picture from the side view, each one of these lines  
23 represents where in the cervical spine one of these horizontal  
24 views were done.

25 And as we look through them we see that at one level,

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1 the C3-4 level, there is a small disk herniation, a small  
2 protrusion of the disk material backwards into the spinal  
3 canal. It is not pressing on the spinal cord, nor is it  
4 pressing on any of the nerve roots. And that's basically what  
5 we see. We see the other small osteophytes or bone spurs at  
6 the other two levels that I had indicated earlier. So we have  
7 here a patient who has some degeneration in her cervical spine  
8 at two levels, some degeneration and a small disk herniation at  
9 the C3-4 level.

10 Q. And with that, Doctor, with that review, that was dated  
11 what, March 10 of 2007?

12 A. Yes.

13 Q. And did you come to have any impressions or conclusions  
14 based upon your review of that?

15 A. Well, yes. My impression is that there is evidence of  
16 degenerated disk disease at several levels with a small disk  
17 herniation at C3-4 without evidence of either spinal cord or  
18 nerve root compression.

19 Q. And what does that mean?

20 A. That means that one would not expect there to be any  
21 neurological dysfunction as a consequence of this disk  
22 herniation since it's not pressing or interfering with the  
23 function of either the spinal cord or the nerve roots. There  
24 might be some stiffness in the neck, there might not be any  
25 symptoms whatsoever. It's not uncommon to see disk

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Rothman - direct

1 degeneration and small disk herniations in asymptomatic  
2 individuals.

3 Q. There is no extruded disk material?

4 A. There is no extruded disk material, that's correct.

5 Q. And if this was taken March 10 and the accident occurred  
6 February 14, would it be your opinion that this predated the  
7 March 14 motor vehicle accident that we are here for today?

8 THE COURT: February?

9 MR. COFFEY: February 14.

10 A. The disk degeneration and osteophytes at two levels  
11 certainly preceded the accident. One couldn't tell one way or  
12 another when the disk herniation occurred. It could have  
13 preceded it, it could have occurred at the time, it could have  
14 occurred subsequent to it.

15 Q. If you were to take a look at -- you review many of these  
16 MRIs, is that correct?

17 A. I do.

18 Q. To put it in perspective for the jury, how many do you  
19 review monthly or annually?

20 A. Thousands. Annually, thousands. Over the lifetime of my  
21 career, tens of thousands.

22 Q. And this is in the small range of herniated disks, if at  
23 all?

24 A. Extremely small.

25 Q. What does the gamut, when you rank them, what does it go

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Rothman - direct

1 from, extremely small up to what, pretty large?

2 A. Very large.

3 Q. What would be the next film set that would be of import for  
4 the jury?

5 A. The next set is a series of MRI scans of the lumbar spine,  
6 the low back. And I've put them up starting the same way, so  
7 these are the sagittal or side views. Again, picture the  
8 patient positioned as I am, with the front of the patient to  
9 the left of each one of these individual films, the upper part  
10 of the abdomen near the top and the lower part of the pelvis  
11 towards the bottom. Once again, if we look at the third row,  
12 we can see a series of images through the center of the spine  
13 and we can see square areas representing the vertebra, flat  
14 areas in between them representing the disks, and the white  
15 area behind it representing the spinal fluid in the spinal  
16 canal. And if you were close enough, you can see some black  
17 lines running through that spinal fluid and they represent the  
18 nerve roots. The spinal cord actually ends in the upper lumbar  
19 or lower part of the chest and does not extend all the way down  
20 into the spinal canal as it is located in the rest of the  
21 spinal canal.

22 If you look carefully you can see that one of the  
23 disks, the disk between the fifth lumbar and first sacral  
24 segment, is very dark. That indicates that it's severely  
25 degenerated and this kind of degeneration takes a long time to

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1 develop. One can also see, again, a very small disk herniation  
2 at that L5-S1 level, which can be, once again, demonstrated in  
3 the horizontal or the axial views, and we see it down here as a  
4 very small disk herniation, once again, with no evidence of  
5 spinal nerve compression. And that would be the sum and  
6 substance of the important findings in the lumbar spine.

7 Q. What is spinal cord compression?

8 A. Spinal cord compression is just literally a force being  
9 applied in distorting the configuration of the spinal cord.

10 Q. And you do not see that?

11 A. The spinal cord doesn't extend down this far, so there  
12 could be no spinal cord compression in this level, but there is  
13 no nerve root compression. All we have down at this level are  
14 the nerve roots that are ultimately going to go to the lower  
15 extremities.

16 Q. So your review of that film finds no herniation?

17 A. It finds a very small herniation, but no evidence of nerve  
18 root compression.

19 Q. And that would be the important thing you would be looking  
20 for, is that correct?

21 A. Correct.

22 Q. And would it be fair to say that there was evidence then of  
23 chronic degeneration in the lumbar spine?

24 A. There is no question that at the L5-S1 level there is  
25 rather severe chronic degeneration, and that's seen by the very

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1 dark appearance indicating the degeneration at that level.

2 Q. Now, was there also desiccation at L2-3, L3-4 and L5-S1?

3 A. There is actual mild desiccation at all of the levels, but  
4 it's most marked at L5-S1.

5 Q. What does desiccation mean?

6 A. Desiccation means a drying out of the disks, and it happens  
7 to all of us, unfortunately. As we age, there is no blood  
8 supply to the disk, so there is no way to replenish water that  
9 ultimately leaches out of the disk. So all our disks  
10 ultimately dry. And as they dry, they lose their elasticity  
11 and they become more prone to degeneration and to herniation as  
12 a consequence of that drying-out process.

13 Q. Would you have an opinion, if these were taken on March 10,  
14 if the accident occurred on February 14, that these would have  
15 been preexisting before the February 14 accident?

16 A. There is no question that the degeneration that's present  
17 at the L5-S1 level preceded it and preceded it by a long time.  
18 There is really very extensive degeneration. And it's quite  
19 likely that the disk herniation also preceded it because it has  
20 a very dark appearance to it, meaning that it's desiccated.  
21 But one can't be quite as definitive about that. The odds are  
22 is that all these changes in the lumbar spine preceded the  
23 accident and many of them by a long period of time.

24 Q. And is there any way to see if the changes that preceded  
25 the accident, would you be able to tell if they were -- they



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1     were caused because of any trauma or degeneration or you can't  
2     tell, Doc?

3     A.   You can't tell by simply looking at the MRI.   A trauma  
4     could have contributed to it.   More often than not it's just  
5     essentially normal wear and tear, if you will, and repetitive  
6     stress as opposed to a single or two or three traumatic events.

7     Q.   There was also some degeneration when you looked at the --  
8     bringing you back to the cervical imaging, the cervical imaging  
9     also showed chronic degenerative changes?

10    A.   There are chronic degenerative changes in the cervical  
11    region.   The osteophytes that I described at two levels are the  
12    result of chronic degeneration, and there is some disk  
13    desiccation in the cervical region as well.   And one would  
14    expect to see disk desiccation in one part of the spine and the  
15    other as part of the aging process that leads to degeneration.

16    Q.   Now, on the x-rays -- did you review some x-rays?

17    A.   I did.   I don't have those with me, but they are here.   I  
18    saw them earlier.

19    Q.   What's really better for us to be looking at?   What tells  
20    the jury more, the x-rays or the MRIs?

21    A.   In terms of degeneration and disk herniation, there is no  
22    comparison.   The MRIs tell us the most.   The x-rays can tell us  
23    whether there are fractures or dislocations and this is a  
24    lateral view of the cervical spine, the side view.   You can see  
25    the jaw and the skull here.   You can see the cervical spine

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1 here. You can see all of the vertebra. And this is -- there  
2 may be some minimal degenerative change at the C5-6 level, the  
3 small osteophyte there, but a relatively unremarkable looking  
4 cervical spine, certainly no evidence of any acute injury here.

5 Q. And were you able to determine from your review if there is  
6 a normal range of motion and flexion and extension?

7 MR. PLATTA: Objection.

8 THE COURT: Overruled. You know, Mr. Coffey, we have  
9 made a variety of timetables for the plaintiff. We are  
10 approaching that procedure with you.

11 MR. COFFEY: Okay. Thank you.

12 THE COURT: You're welcome.

13 A. There were films of flexion and extension and there was no  
14 evidence of abnormality in flexion or extension.

15 Q. Finally, did you review a discogram that you provided a  
16 supplemental report on April 28 of 2008?

17 A. I did.

18 Q. And what's a discogram?

19 A. A discogram is a test that shows us to some degree what the  
20 disk looks like by injecting a contrast material into the disk  
21 with a needle to try to outline the center of the disk. That  
22 discogram showed a small disk herniation at the C3-4 level.

23 Q. Was there any other abnormalities noted?

24 A. No.

25 Q. So that corroborated some of the earlier MRI findings?

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1 A. Correct.

2 MR. COFFEY: I have no other questions. Thank you.

3 One other.

4 Q. Are you being paid for your time here?

5 A. Yes.

6 Q. How much are you being paid?

7 A. \$3500.

8 Q. You're taking time away from your practice to be here?

9 A. Yes.

10 MR. COFFEY: Thank you.

11 THE COURT: Any cross?

12 MR. PLATTA: Yes, your Honor.

13 THE WITNESS: Do I sit down?

14 THE COURT: Stay right there. Cross-examination is  
15 part of what we do here in America.

16 THE WITNESS: I meant should I sit in the chair?

17 THE COURT: You should sit wherever you feel welcome  
18 other than the jury box.

19 CROSS-EXAMINATION

20 BY MR. PLATTA:

21 Q. Good afternoon, Doctor, how are you?

22 A. Good afternoon. Very well. Thank you.

23 Q. Doctor, could you have a look at artwork. This is a  
24 depiction of the MRI film that we just showed to the jury. We  
25 have the same one on the table right on your left side. Could

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Rothman - cross

1 you show the jury where exactly is the herniation in the lumbar  
2 sacral spine of my client?

3 And, Doctor, how do you know it's a herniation?

4 A. I know it's a herniation by looking at the side view, the  
5 sagittal view and the axial view by seeing that there is a  
6 localized protrusion beyond the normal disk margin.

7 Q. How do you know whether it preexists the accident of  
8 February 14 or it doesn't?

9 A. The only way one can make that determination is based on  
10 the color, if you will, or the darkness. Fresh disk  
11 herniations in this particular sequence, which we call a T2  
12 sequence, remain relatively bright in their appearance. They  
13 look light in color as opposed to this, which is dark. That  
14 tells me that it's dried out, it's desiccated, and more likely  
15 than not has been there for a while.

16 Q. Doctor, do you agree with me that a herniation could be  
17 asymptomatic?

18 A. Could be asymptomatic?

19 Q. Yes.

20 A. Absolutely.

21 Q. Do you agree with me that symptoms of herniated disk  
22 compressing the spine could start after the accident?

23 A. Symptoms from herniated disks can occur at any time.

24 Q. Correct. But, hypothetically, if I were to tell you that  
25 my client had no prior treatment for her spine and she started

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Rothman - cross

1 having treatment after the accident only, would that be an  
2 indication to you that it's possible that this herniation  
3 became painful after the accident?

4 A. I see. You're asking me if a patient has a preexisting  
5 herniation that was asymptomatic and had an accident, could it  
6 become symptomatic?

7 Q. That is correct.

8 A. It's possible.

9 Q. And, Doctor, could you show us also the herniation from the  
10 cervical spine?

11 A. Yes. The herniation in the cervical spine in the side view  
12 is here between 3 and 4, and in the axial view is here; and,  
13 again, somewhat similar appearance in the axial view to the  
14 herniation in the lumbar spine.

15 Q. Doctor, the same question, is it possible that this  
16 herniation was asymptomatic prior to the accident and became  
17 symptomatic postaccident?

18 A. Possible.

19 Q. Did you review any records that would indicate that it was  
20 actually symptomatic before February 14?

21 A. No. I saw no records that I can recall that had anything  
22 to do with anything before the accident occurring.

23 Q. Did you see any MRI films?

24 A. Before the accident?

25 Q. Yes.

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Rothman - cross

- 1 A. No.
- 2 Q. Do you know of any?
- 3 A. I don't know of any, no.
- 4 Q. Did you ask the defense counsel to provide you with any
- 5 prior records?
- 6 A. Yes.
- 7 Q. Did they do that?
- 8 A. I asked them if there were prior MRIs and, as far as I
- 9 know, there were no prior MRIs.
- 10 Q. Why do we usually have MRI?
- 11 A. Pardon?
- 12 Q. Why patients are referred for MRI, usually?
- 13 A. A whole host of reasons.
- 14 Q. Could it be also be because of the pain?
- 15 A. Certainly.
- 16 Q. Doctor, the disk injury that you see here, is this the
- 17 herniation or it's a bulging --
- 18 A. This is a herniation.
- 19 Q. What is the difference between bulging disk and herniated
- 20 disk?
- 21 A. In a bulging disk, the entire disk stretches and uniformly
- 22 extends out so that if this were -- if there were a bulging
- 23 disk we would see a uniform extension of the disk beyond its
- 24 bony margin, and that is a phenomenon that occurs in disk
- 25 degeneration. When it's localized and just sticks out in a

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Rothman - cross

1 focal area, then we call it a herniation because that implies  
2 that there has been some extension of the center of the disk  
3 beyond the margin of the disk and that's my definition disk  
4 herniation.

5 Q. Doctor, as a matter of fact, you wouldn't be able to tell  
6 when this herniation became symptomatic?

7 A. You can't look at a film and determine whether it is even  
8 symptomatic. It might not be symptomatic at all.

9 Q. I agree with you. But it can also be symptomatic.

10 A. Could be symptomatic.

11 Q. Did you see the patient?

12 A. No.

13 Q. I'm sorry. It wasn't the patient. Did you see  
14 Ms. Frometa?

15 A. No.

16 Q. Did you operate on her?

17 A. No.

18 Q. If I were to tell you hypothetically that there was a  
19 doctor who did the surgery on her and found this herniation and  
20 removed portion of the disk, would it surprise you?

21 A. That somebody found the herniation?

22 Q. No. That someone would decide to operate on this disk.

23 A. It would.

24 Q. In front of you you can see the depiction, artwork of the  
25 procedure that Dr. Babu did and referred to it as being very

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Rothman - cross

1 specific and accurate and it's in evidence. Could you please  
2 show us where do you see herniated disk in these pictures?

3 MR. COFFEY: Objection.

4 THE COURT: I'll overrule it.

5 A. Where I see a herniated disk on the artwork, not where  
6 there is necessarily a herniated disk in the patient?

7 Q. I want you to assume --

8 MR. COFFEY: Your Honor, this is exactly --

9 THE COURT: You can't all talk at once. Because  
10 obviously if he's talking, at least if I'm included, the  
11 reporter is only going to take me. Second of all, I can't rule  
12 if I don't hear who is saying what.

13 MR. COFFEY: The objection is, your Honor, it's not  
14 that one. It's the diagram. It's not a film that he has up on  
15 the easel.

16 THE COURT: Please correct it, Mr. Platta. I'm only  
17 looking at this, so it's really too bad.

18 MR. PLATTA: I'm showing right now the same thing as  
19 the expert is showing.

20 THE COURT: Good to know because I can't see that, but  
21 I can see this fine.

22 Q. Sir, could you show us exactly where the herniation is on  
23 this artwork?

24 A. Well, this is what is supposed to be representing the  
25 herniation on the artwork. That does not correspond to what's



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Rothman - cross

1 on the MRI scan.

2 Q. It's not, right?

3 A. Correct.

4 Q. And if I were to tell you that Dr. Babu testified under  
5 oath that this is the accurate depiction of what he saw  
6 actually in my client's spine, you wouldn't agree with that,  
7 right?

8 A. I can't disagree with what he actually saw. I wasn't  
9 there. I can only respond to what I see on the MRI scan.

10 Q. Would you agree with me that a neurosurgeon who opened  
11 somebody's back would be in a better position to say what kind  
12 of herniation, what kind of injury to her disk happened than  
13 just by reviewing the MRI? Would you?

14 MR. COFFEY: Objection.

15 THE COURT: I'll allow it.

16 A. In general, I would.

17 Q. In this case?

18 A. I can't speak to this case because I wasn't there and I  
19 don't know the people involved.

20 Q. So we agree on the fact that neurosurgeon would be in a  
21 better position to say whether this disk was actually causing  
22 pain, numbness, tingling, correct?

23 A. Yes.

24 Q. Doctor, you never did any surgeries? You're a radiologist,  
25 right?

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Rothman - cross

1 A. Correct.

2 THE COURT: You can sit down, I think.

3 MR. PLATTA: Yes, your Honor.

4 THE WITNESS: Thank you.

5 Q. Doctor, when you testified a few minutes ago, you said that  
6 there could be no spinal compression based on the review of the  
7 MRI films?

8 A. I believe that I said there was no evidence of either nerve  
9 root compression in the lumbar area, and no evidence of either  
10 nerve root or spinal cord compression in the cervical region.

11 Q. You never used the word could during your testimony  
12 regarding spinal compression?

13 A. I'm sorry. I don't understand the question.

14 Q. I will withdraw the question.

15 Doctor, do you testify in court only for defendants or  
16 for plaintiffs as well?

17 A. Plaintiffs and defendants.

18 Q. How would you say percentage wise, which one is more?

19 A. In medical malpractice cases or personal injury cases?

20 Q. Any. All together.

21 A. More often for defendants, but plaintiffs as well.

22 Q. And you were called here by defendants, correct?

23 A. Yes.

24 Q. I want you to ask you one last question. Are you aware  
25 that Dr. Crane depended on your reading of the MRI films in his

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Rothman - cross

1 diagnosis stating that my client has no injuries resulting from  
2 the February 14, '07 accident? Do you know that?

3 A. No.

4 MR. PLATTA: Thank you.

5 THE COURT: You're excused, I presume, unless you got  
6 anything further. Thank you very much.

7 THE WITNESS: Thank you, your Honor.

8 (Witness excused)

9 THE COURT: What's next, Mr. Coffey?

10 MR. COFFEY: Dr. April.

11 MR. PLATTA: Your Honor, can we take a five-minute  
12 break?

13 THE COURT: Sure, we will take a five minute break.

14 (Recess)

15 ROBERT S. APRIL,

16 called as a witness by the Defendants,

17 having been duly sworn, testified as follows:

18 DIRECT EXAMINATION

19 BY MR. COFFEY:

20 Q. Doctor, you're being paid for your time here today?

21 A. Yes.

22 Q. How much time are you being paid for your time today?

23 A. I'm being paid \$6,000 for the day.

24 Q. Have you testified in court before?

25 A. Yes.

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1 Q. And have you testified for plaintiffs and defendants?

2 A. Yes.

3 Q. Have you testified more for defendants, is that fair to  
4 say?

5 A. Yes.

6 Q. Tell us a little bit about, are you board certified?

7 A. Yes.

8 Q. What are you board certified in?

9 A. In the field of neurology.

10 Q. Do you have any privileges in any hospitals?

11 A. Yes.

12 Q. What hospital?

13 A. Mt. Sinai Hospital and Medical Center and Lenox Hill  
14 Hospital and New York University Medical Center.

15 Q. Where did you receive your medical degree?

16 A. At University of California.

17 Q. Do you have any military training?

18 A. Yes.

19 Q. And what was that?

20 A. I was a commander in the coast guard and director of the  
21 United States Marine Hospital neurology department in  
22 Baltimore, Maryland between 1969 and 1971.

23 Q. And in that position did you deal with pain management?

24 A. Yes.

25 Q. And do you have any experience in dealing with pain

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1 management?

2 A. Yes.

3 Q. And you're a neurologist?

4 A. Yes.

5 Q. At some point did we retain you to review medical records  
6 and come up with a conclusion in response to the plaintiff's  
7 life care plan?

8 A. Yes.

9 Q. Could you tell the jury what medical records you reviewed?

10 MR. PLATTA: Your Honor, I would like to object. This  
11 expert was retained as a life care planner to rebut my expert,  
12 Dr. Kincaid. I don't see the qualifications necessary for life  
13 care planner testimony.

14 THE COURT: I am not sure he's going to be a life care  
15 planner. What are we going to have when we are finished  
16 qualifying him?

17 MR. COFFEY: He is going to talk about that he didn't  
18 believe that what the life care planner talked about was  
19 medically necessary.

20 THE COURT: That's about the life planner?

21 MR. COFFEY: Yes. And he came to conclusions for  
22 that.

23 MR. PLATTA: Your Honor, I am saying this witness is  
24 not qualified to discuss life care plan because he doesn't have  
25 qualifications --

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1 THE COURT: Can I listen to some more before I rule?

2 MR. PLATTA: Thank you, your Honor.

3 THE COURT: We all agree what he's going to be  
4 testifying to allegedly, right?

5 MR. COFFEY: Yes.

6 Q. Doctor, as a neurologist, you have patients?

7 A. Yes.

8 Q. At times are you ever asked to make life care plans or  
9 future medical need assessments for your patients?

10 A. Yes.

11 Q. How many years have you been practicing medicine?

12 A. I suppose, since I graduated medical school.

13 Q. Would it be fair to say you've made these assessments,  
14 these life care type assessments, for many patients through the  
15 years?

16 A. Yes.

17 THE COURT: We heard the plaintiff. He doesn't share  
18 your view. I would like a little more information about what  
19 you do in the way of life care planning, how often you make  
20 reports with respect to life care planning, and the like.

21 A. I don't know if the term life care planning is always used  
22 per se, but what we are talking about is prognosis for the  
23 future of an individual who has an alleged disability.

24 In terms of the cost of maintaining the function and  
25 structure of his lifestyle depends entirely on the severity of

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1 the disability and its objective nature in terms of assessing  
2 what will be the needs for other individuals caring for the  
3 person, what kinds of support systems, what kinds of  
4 nutritional facilities, and in general what kinds of housing.  
5 All of those are cost-related items that deal with life care  
6 planning and they are based on, in a neurological case, the  
7 neurological aspects, without which there would be no caring.  
8 It would be simply building a house without a foundation.

9 THE COURT: I understand your objection, but I'm  
10 overruling it.

11 MR. PLATTA: Your Honor, I just want to point out to  
12 your attention that this witness is qualified in the field of  
13 neurology, not in the life care planning. Note my exception.

14 THE COURT: Didn't you hear what he has done for a  
15 living and what he's done for the last 40 or 50 years?

16 MR. PLATTA: Yes, I have.

17 THE COURT: You're welcome to object.

18 Q. Doctor, did you review records?

19 A. Yes, I did.

20 Q. What were they briefly?

21 A. Briefly, it was the life care plan prepared by Dr. Charles  
22 A. Kincaid, and that was a 39-page document. In addition to  
23 that, I reviewed various medical documents which were referred  
24 to in the life care plan and which were used as the basis for  
25 the formulations reached by Dr. Kincaid.

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1 Q. After you reviewed all those did you come to any opinions  
2 with regards to what the accident caused and what the future  
3 neurological needs would be for the plaintiff?

4 A. Yes.

5 Q. What were they?

6 A. My conclusion was that the assumptions on which the life  
7 care plan was based, those assumptions were not correct and  
8 that based on that review, which was entirely medical, this  
9 individual had not reached a catastrophic disability or really  
10 any significant disability that would need the kinds of  
11 interventions, cares, and prognosis that were established,  
12 solely on the basis of information given by those practitioners  
13 who were taking care of that individual.

14 Q. Based upon your review did you come to a medical conclusion  
15 with a reasonable degree of medical certainty?

16 A. Yes. First, I concluded that the accident of record was  
17 not sufficient to make a neurological diagnosis.

18 MR. PLATTA: Objection, your Honor.

19 THE COURT: Overruled.

20 A. Secondly, I concluded that the degree of disability was not  
21 justified by any evidence-based statements made by  
22 practitioners whose reports are in the record, and that,  
23 thirdly, therefore, the conclusions reached by Dr. Kincaid  
24 were, although well meaning, they were erroneous and therefore  
25 the numbers that are involved have to be questioned.



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April - direct

1 Q. So you believe that much of what the doctor -- what the  
2 life care planner recommended were not necessary?

3 A. That's correct.

4 Q. So you would disagree with his conclusion that would say  
5 that there is several million dollars worth of future treatment  
6 needed?

7 THE COURT: During the balance of her life?

8 Q. During the balance of her life.

9 A. Yes.

10 Q. You would also agree that she does not need a home health  
11 care aide for many hours a week starting now or in the future  
12 on the basis of this accident, is that correct?

13 A. Yes.

14 Q. And you did not see the need for any further surgical  
15 interventions based upon this accident, is that correct?

16 A. That's correct.

17 Q. And did you see anything that caused the plaintiff to be  
18 permanently losing the total use of the spine?

19 A. No.

20 Q. Did you see anything that showed that the plaintiff from a  
21 neurological life care standpoint sustained a significant  
22 limitation of the use of a body function or system?

23 MR. PLATTA: Objection.

24 THE COURT: Overruled.

25 A. No.

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April - direct

1 Q. Now, I want you to assume that following the accident --  
2 and you reviewed some of the records -- the plaintiff worked  
3 following the accident without limitations. Was she, in your  
4 opinion, able to perform --

5 MR. PLATTA: Objection.

6 THE COURT: Sustained. I'm not clear about the  
7 without limitation piece.

8 Q. Did you see anything that as a result of this accident she  
9 would be unable to perform her usual and customary activities  
10 following this accident?

11 A. I did not.

12 THE COURT: All these hospitalizations and all these  
13 spinal problems and operations and all these disk problems and  
14 operations, they were just gossamer?

15 THE WITNESS: They were gossamer. I am not sure what  
16 you mean by that.

17 THE COURT: They were meaningless.

18 THE WITNESS: They might have been meaningful to the  
19 patient herself who was suffering from symptoms and the doctors  
20 chose to intervene to alleviate those symptoms, which were the  
21 subjective statements of the plaintiff, but none of the  
22 documents that I reviewed showed any degree of motor  
23 incapacitation on an objective basis that would limit functions  
24 or limit the use of a functional body part. And those are the  
25 bases for which the long-term prognosis and the degree of

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1 intervention that led to the costs you've cited actually were  
2 based, and that's where I disagree. I mean, in a sense, the  
3 analogy -- certainly I see patients who complain of pain and we  
4 certainly do intervene. I send them to surgeons who do  
5 epidural injections. Pain is relieved, but these people on  
6 that basis don't necessarily or most of them go on to  
7 progressive loss of function that will in the future allow me  
8 to say that ten years down the road you're going to be  
9 disabled.

10 THE COURT: What do you do with these people? Do you  
11 turn them out? Do you say, listen, you have had enough of my  
12 time?

13 THE WITNESS: Not at all. I don't see --

14 THE COURT: I don't quite understand what you're  
15 saying. You've got somebody who opines that she is in  
16 significant pain, the doctor believes that from what he can  
17 see, the doctor, just like you, she needs an operative  
18 procedure, he does the operative procedure, it doesn't take the  
19 pain away, so he does another one, and she still has the kind  
20 of pain that she testified about and three other doctors  
21 testified about. So I'm asking you what you would do.

22 THE WITNESS: Well, I would continue treating her the  
23 way the doctors do. But you're asking me what we do in the  
24 future with someone like this. We don't, on the basis of what  
25 you just stated and what I've been able to review, simply

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1 conclude that this person is permanently and totally disabled  
2 unless her behaviors, motor and behavior and general sense of  
3 social interaction, daily activity suggests that she is in such  
4 pain that she is limited, and that's the objective basis of  
5 pain analysis because ultimately you're reduced to saying, how  
6 do you feel? And if somebody says I hurt, that's the best you  
7 can do.

8 But if he doesn't act like he hurts or in any way  
9 doesn't fulfill a constraint of activity, a restriction of  
10 activity -- that is what we expect to be consonant with pain --  
11 then we can't make a disability rating that could generate a  
12 lifelong of passive receipt of millions of dollars of help.  
13 Otherwise, we would have to stop attempting to be objective and  
14 simply take everybody's word for hurting and anybody's pain  
15 could be sufficient to generate something like that.

16 THE COURT: Happily, we have a jury. I don't have do  
17 this fact finding.

18 Q. Doctor, is your conclusion that the life care plan was  
19 unnecessary and erroneous, is that correct?

20 A. My conclusion was it was based on erroneous bases of fact,  
21 and I'm basing that on examinations that are described by  
22 various practitioners whose reviews I saw.

23 Q. You read Dr. Krishna's records, Dr. Babu's records, and Dr.  
24 Davy's records?

25 A. Yes. And also Dr. Crane's records.

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April - direct

1 Q. And also Dr. Rothman's independent review of the x-rays?

2 A. Yes.

3 MR. COFFEY: I have no further questions. Thank you,  
4 Doctor.

5 THE COURT: It's your turn.

6 MR. PLATTA: Thank you.

7 CROSS-EXAMINATION

8 BY MR. PLATTA:

9 Q. Good afternoon, Doctor.

10 A. Good afternoon.

11 Q. Did you ever examine Ms. Frometa?

12 A. No.

13 Q. Did you ever review an MRI film of Ms. Frometa?

14 A. No.

15 Q. Let me think. Did you ever operate on her?

16 A. No. I didn't see her.

17 Q. Doctor, do you know what is the International Academy of  
18 Life Care Planners?

19 A. I'm sorry?

20 Q. Do you know what is the International Academy of Life Care  
21 Planners?

22 A. No, not independently.

23 Q. If I were to tell you that Dr. Kincaid, that you criticized  
24 so heavily, is actually a member of this organization, as a  
25 professional life care planner, would you be surprised?

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April - cross

1 A. No. I think I knew that because he signed his name that  
2 way.

3 Q. And, Doctor, do you know what the American Board of  
4 Vocational Experts is?

5 A. I've heard of it. I've seen its name.

6 Q. Are you a member of that?

7 A. No.

8 Q. Do you know who is the commissioner of health care?

9 A. In the State of New York?

10 Q. Yes.

11 A. I don't know him by name.

12 Q. You're not certified by them to be a life care planner, are  
13 you?

14 A. No.

15 Q. As a matter of fact, you don't have any certification for  
16 life care planning, correct?

17 A. I think we have established that, that's correct.

18 Q. But you do have field of specialty in which you testify  
19 most of the time, correct?

20 A. Yes. All of the time.

21 Q. All of the time, correct?

22 A. Yes.

23 Q. What is it?

24 A. It's neurology.

25 Q. As a neurologist, would you be able to give an opinion with

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April - cross

1 a straight face to the jury?

2 MR. COFFEY: Objection.

3 THE COURT: Sustained.

4 Q. Doctor, as a neurologist, without seeing a patient once,  
5 without reviewing her medical records, without operating on  
6 her, without having anything to do with her besides seeing  
7 medical records, would you be able to say or would you be able  
8 to give any kind of opinion as to her injuries?

9 A. Yes.

10 Q. Let's go through that. Doctor, you said that you reviewed  
11 some medical records, right?

12 A. I can't understand what you're saying. I'm sorry.

13 Q. I will speak up. Doctor, you reviewed some medical  
14 records, correct?

15 A. Yes.

16 Q. What kind of medical records did you review?

17 A. I reviewed Dr. Kincaid's life care plan, I reviewed  
18 narrative reports from Dr. Villafuerte, I reviewed the records  
19 from the Cabrini Hospital emergency room on the date of  
20 accident, I reviewed reports from Standup MRI of Manhattan, I  
21 reviewed narrative reports by Dr. Arden Kaisman, I reviewed  
22 chiropractic reports from Xcalibur Chiropractic, I reviewed Dr.  
23 Krishna's reports, I reviewed Dr. Ramesh Babu's reports, I  
24 reviewed Dr. Andrew Davy's reports, I reviewed Dr. Babu's  
25 operative note, I reviewed Dr. Edward Crane's narrative report,

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April - cross

1 I reviewed Dr. Lewis Rothman's independent review of spinal  
2 x-rays and MRIs.

3 Q. Doctor, beside the reviews by defendants' doctors,  
4 Dr. Rothman and Dr. Crane, did any of the other physicians who  
5 actually operated, treated, and took care of my client for last  
6 year and a half, did any one of her physicians -- physicians,  
7 not experts hired for this trial, but physicians -- did any one  
8 of them ever indicate in their report that her injuries are not  
9 causally related to this accident of 2/14 of '07?

10 A. No, with explanation.

11 Q. I'm sorry?

12 A. I said no, with explanation.

13 Q. Doctor, is it fair to say that the only source of your  
14 negative review of this case is the review by Dr. Crane and  
15 Dr. Rothman because other physicians were actually giving  
16 restrictions of motions, pain, suffering, limitations of her  
17 body functions, of her spine? Would you agree with me?

18 A. No, with explanation.

19 Q. Doctor, could you show me the records that you reviewed?

20 A. I can only show you the records of Dr. Kincaid.

21 Q. Do you have any --

22 A. The rest were sent back to the attorney's office.

23 Q. Don't you know that under the federal rules of procedure,  
24 you're obligated to have them at the time of trial?

25 A. I'm sure we have them.



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April - cross

1 Q. Doctor, are you trying to say that beside the report you  
2 don't have anything today with you?

3 A. If you mean with me in this space?

4 Q. Yes.

5 A. I have Dr. Kincaid's reports and the other space is on that  
6 desk.

7 Q. Doctor, do you realize that in your report you are saying  
8 that you reviewed many records that you don't have in your file  
9 right now?

10 A. I have explained that to you.

11 Q. You wouldn't be able to show me a place in the physicians'  
12 records that would actually support your position, would you?

13 A. I think I would or I wouldn't have stated my position.

14 Q. Could you show me that?

15 A. I will have to get the records.

16 THE COURT: The defendant will produce the records if  
17 they are in fact, as he says, here.

18 MR. PLATTA: Sure.

19 THE WITNESS: If you bear with me, I am going to look  
20 for them.

21 THE COURT: Here he comes.

22 These are all records that you reviewed, as I  
23 understand it?

24 THE WITNESS: Yes.

25 Q. Doctor, were they delivered to you in the same form like

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April - cross

1 you have them right now?

2 A. To the best of my recollection.

3 Q. And they have the hard cover and they were --

4 A. I can't remember. That was a long time ago.

5 Q. When was it?

6 A. Several months ago. I am going to refer first to the  
7 narrative report of April 11, 2007.

8 Q. Of which doctor?

9 A. Which is signed by Dr. R.C. Krishna and which is entitled  
10 Westchester Medical Care, PC. And in this I am going to refer  
11 to the general physical and neurological examination, which  
12 states that there are no cranial nerve abnormalities, there are  
13 no abnormalities in mental status, and I can amplify by reading  
14 this word for word if you wish, that the strength of cranial  
15 nerve innervated muscles are normal, that there is normal power  
16 bulk and tone in all muscle groups except for a minimal  
17 weakness in the deltoid super spinatus biceps and other muscles  
18 on the right side, but it's described as 4 over 5 weakness,  
19 which means in neurological parlance that the resistance to  
20 movement can be overcome by very strong resistance on the part  
21 of the examiner. It is not consistent with any kind of  
22 disability for motor functions in those kinds of muscles.

23 Q. Doctor --

24 A. Let me continue, please.

25 THE COURT: He's asking you the question.

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April - cross

1 A. I thought he said he wants me to read this.

2 THE COURT: Now he's asking you another question.

3 Q. Doctor, did you review EMG results?

4 A. Yes.

5 Q. Can you tell me what they say?

6 A. Of course. Let me find them. I can tell you from my own  
7 review. Would you like me to read them?

8 Q. Yes, please.

9 A. Which?

10 Q. Your own review is fine.

11 A. Dr. Krishna's EMG study of 3/29/07 was reviewed and he  
12 didn't find anything that could be used to make a disability  
13 conclusion. And now if you'd like me to go into details of  
14 that, I will.

15 Q. Doctor, I'll ask you one more question. Are you aware that  
16 the EMG result was positive for cervical and lumbosacral  
17 radiculopathy?

18 A. Yes.

19 Q. Would you find this an objective or subjective neurological  
20 finding?

21 A. It is an objective finding if it's done by a competent  
22 electromyographer, especially if he records it and has it on  
23 raw data.

24 Q. Would you find Dr. Krishna to be qualified?

25 A. I have no idea.

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April - cross

1 Q. And, Doctor, can you tell me what could be the result of  
2 radiculopathy on a patient --

3 A. What's that?

4 Q. Can you tell me what could be the result of radiculopathy  
5 on a patient?

6 A. It could be anything from no symptoms to pain, to motor  
7 weakness.

8 Q. What would you need to determine whether there was actually  
9 pain? Would it be examination of the patient?

10 A. It would be what the patient says and how the patient  
11 behaves, as I've tried to explain to the jury.

12 Q. Did you have the chance to do that in this case?

13 A. You know I didn't because I didn't see this patient. I  
14 have to rely on the observers and that's what I'm doing.

15 Q. Did you ask your counselors to have the option to see the  
16 patient?

17 MR. COFFEY: Objection.

18 THE COURT: Overruled.

19 A. I was asked to review records.

20 Q. Did you ask for a meeting with the patient?

21 A. No. I was asked to review a life care plan. I was not  
22 asked to see the patient.

23 Q. I understand.

24 A. I didn't ask to see the patient because it wasn't my  
25 patient.

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April - cross

1 Q. Doctor, were you asked to see Ms. Frometa? Forget about  
2 the patient.

3 A. I said no.

4 Q. Any reason for that?

5 A. I'm sorry, what?

6 Q. Would it be important for you to actually see her to be  
7 able to fully come to a medical conclusion regarding her life  
8 care plan that you're criticizing so heavily right now?

9 A. I'm not criticizing. I'm commenting. The other thing I am  
10 saying is, I don't think it would be at all. Of course, if the  
11 patient were in front of me, I would look at her.

12 Q. Doctor, can you tell me one more thing? Can you tell me if  
13 any place in your report did you disagree with the dollar  
14 amounts of Dr. Kincaid?

15 A. Well, I am not capable, as you pointed out so very well, of  
16 coming to any dollar amount conclusions in a normal life  
17 planning care because that's not what I'm qualified to do. I'm  
18 only qualified to make a comment on the accuracy of the  
19 neurological interpretation which Dr. Kincaid is only qualified  
20 to do as a nonneurologist. In a sense, the two should work  
21 together.

22 Q. Perfectly fine.

23 And you were hired for this case to do what, life care  
24 plan evaluation or neurological evaluation?

25 A. I was asked to make a neurological comment as a neurologist

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April - cross

1 on a life care plan that was stated in this case.

2 Q. That's a nice way to put it.

3 MR. PLATTA: Your Honor, I believe at this point I  
4 will have to move to exclude the doctor's testimony because  
5 he's not only not qualified as a life care planner, but also he  
6 was hired in a different purpose than life care planner.

7 THE COURT: Overruled.

8 Q. Doctor, in your career, do you see patients?

9 A. Yes, sir.

10 Q. What is the percentage of your practice? Is it more  
11 testifying in courts for defendants or private practice?

12 A. I'm in my office approximately eight to ten hours a day and  
13 I go to the hospital one or two. And in that time I probably  
14 see patients to treat 90 to 95 percent of that time.

15 Q. And you think it's important to actually see a patient in  
16 order to come to any conclusions, medical conclusions?

17 A. Yes, with explanation.

18 Q. And would you think it would be important to see  
19 Ms. Frometa in this particular case?

20 A. In this case, I stated why it was not critically important  
21 to see this patient, but I'll say it again if you want me to  
22 explain.

23 Q. No, thank you.

24 Doctor, in your review of the Cabrini Hospital  
25 emergency room records, did you find any note that my client

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April - cross

1 lost consciousness as a result of this accident?

2 A. Excuse me one second. There was a checkoff part of the  
3 nursing triage to which I made reference. It said lost  
4 consciousness. That didn't say she observed her to be  
5 conscious.

6 Q. I understand. Based on the medical review of the medical  
7 records and also not being able to be present in the emergency  
8 room with the patient, you would assume that she actually lost  
9 consciousness at the time of the accident, wouldn't you?

10 A. No.

11 Q. I thought that you just said that you can base review of  
12 patient's health and injuries based just on her records?

13 A. Yes.

14 Q. Doctor, in your report did you actually have an opinion on  
15 the size of this accident? Did you state --

16 A. I am not sure I understood the sequence of verbs.

17 Q. Doctor, did you state in your report that this is a minimal  
18 accident of record?

19 A. Oh, yes, but that's my opinion based on the Cabrini  
20 Hospital emergency room record.

21 Q. Doctor, in the review of records did you ever see this?

22 A. What am I looking at?

23 Q. At your screen.

24 A. It's not on. Do I have to turn it on?

25 THE DEPUTY CLERK: No.

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April - cross

1 Q. Did you ever see that?

2 A. I am not sure what I'm looking at.

3 Q. Look at your screen. You have the same thing on your  
4 screen?

5 A. I am going to have to ask you some questions because I'm  
6 not sure what I'm looking at. I see a man's hand on a metal  
7 object which looks like the rear end of a car.

8 Q. Does it look like severely damaged?

9 A. It looks like the rear end is damaged.

10 Q. Does it look like severe damage?

11 A. I'm not a body repair person either, so I am going to just  
12 tell you, it looks damaged.

13 Q. Doctor, if I would tell you that this is my client's car  
14 after the accident, would you still think it's a minimal  
15 accident of record?

16 A. I would like to qualify that. I think it's a severe  
17 perhaps accident for the rear end of the car, but that's not  
18 the patient. The patient is described in the records, not in  
19 this picture.

20 Q. Correct. And these records do not really indicate, beside  
21 your own review and beside the defendants' doctors' review,  
22 that my client did not need any surgeries, correct?

23 A. I'm sorry. I don't understand the sequence of your  
24 statements. Could you say that again?

25 Q. I'll rephrase it. Hold on one second.



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April - cross

1 Doctor, would you please have a look at the depictions  
2 of surgeries that was done for Ms. Frometa. Please assume that  
3 they are accurate depictions of the surgeries and what the  
4 surgeon, neurosurgeon actually saw in her spine. And please  
5 assume that he stated on the record, under oath, that this  
6 surgery was necessary, the same as her pain management doctor  
7 put her surgery on the right side and they both saw what is  
8 inside Ms. Frometa's spine. The question is --

9 A. May I sit down.

10 Q. Can you tell us, are you still certain that that she wasn't  
11 injured?

12 A. May I just repeat back to you what you're asking me because  
13 I want to be sure to give an absolutely honest and truthful  
14 answer this way.

15 Q. Doctor, let he rephrase it this way.

16 A. But speak up so I can hear you.

17 Q. Doctor, there were two physicians, Dr. Babu, neurosurgeon,  
18 and Dr. Davy, pain management doctor, who operated on  
19 Ms. Frometa, not only operated, but did implants of the  
20 neurostimulators as well as steroid injections for this  
21 patient, and these depictions are exact depictions of the  
22 procedures that they did. By looking at this depiction, this  
23 artwork that exactly reflects what they saw with their eyes at  
24 the time of the surgery, especially Dr. Babu's surgery where he  
25 opened the spine, is this your opinion without looking at the

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April - cross

1 patient, without operating on her, without even seeing her  
2 medical -- without seeing her MRI films, that she wasn't  
3 injured as a result of this accident?

4 A. You know, I can't answer that question yes or no. It's  
5 impossible.

6 Q. Thank you.

7 THE COURT: Any redirect?

8 MR. COFFEY: Yes, briefly.

9 REDIRECT EXAMINATION

10 BY MR. COFFEY:

11 Q. Doctor, you're not aware that you were retained on the eve  
12 of trial because plaintiff had disclosed --

13 THE COURT: Sustained.

14 MR. PLATTA: Objection.

15 Q. So you have no idea why you were not able to perform an  
16 independent medical examination on the plaintiff, is that  
17 correct?

18 MR. PLATTA: Objection.

19 THE COURT: Sustained.

20 Q. When she went to Cabrini Medical Center was she asked about  
21 severity of pain? Did she say it was mild?

22 A. Would you mind if I refreshed my memory by looking back at  
23 the Cabrini Hospital records? I have them right here.

24 Q. I'll show you a copy of it.

25 A. That's what I'm looking for. Thank you.

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April - redirect

1 Q. Since that was asked about, what was clinically significant  
2 about the Cabrini Medical Center emergency treatment and triage  
3 records?

4 A. Well, there was an ambulance report and there was the  
5 medical center report. And the ambulance drivers did not see  
6 any sign of loss of consciousness. That's number one. They  
7 described her as alert and ambulating, meaning walking, at the  
8 site of the accident, and they took her to the hospital. And  
9 in the hospital the examination has checkoffs, and the  
10 neuropsych examination, which is neurological and mental  
11 status, is all described as normal. There is, in terms of her  
12 complaints, the pain is described as mild and there is no --  
13 there is no description here of any neurological limitation.

14 From a neurological point of view, this is a minimal  
15 to no injury, and it's very difficult for me to conceive how  
16 this trauma, in quotations, could be the result -- could be the  
17 cause of this kind of pathology that could lead to the surgery.  
18 There is an alternative explanation for all of this.

19 Q. And denying the loss of consciousness, that differs from  
20 what Ms. Frometa told some of her medical care providers in the  
21 records you reviewed, is that correct?

22 A. Apparently, there is a variation in what she said to the  
23 ambulance driver and what she said to the triage nurse. But at  
24 no time did anyone see a person who was dazed, confused, had a  
25 head injury, or any other sign that would go along with altered

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April - redirect

1 consciousness.

2 Q. When people are triaged in the emergency room, they do  
3 check for that, it's in some type of coding they use?

4 A. It's like going into a restaurant and setting a table.

5 Q. How do they do that?

6 A. By examining somebody, making a physical inspection of the  
7 body and taking vital signs and looking for areas of bruise, of  
8 cut, of bleeding, all of the normal signs of traumatic injury.

9 Q. And your review of the records found that there was none of  
10 that trauma, is that correct?

11 A. I have reviewed thousands of emergency room records and  
12 that falls into the spectrum of minimal.

13 MR. COFFEY: Thank you, Doctor.

14 THE COURT: Anything further?

15 MR. PLATTA: Yes, your Honor.

16 RECROSS EXAMINATION

17 BY MR. PLATTA:

18 Q. Doctor, would you please have a look at the records from  
19 Cabrini Hospital that you have on your screen. Do you have  
20 them on your screen? You don't have to look around.

21 A. I know I don't have to, but I just feel more comfortable  
22 doing so with your permission.

23 Q. Of course. Do you see where lost consciousness is marked?

24 A. I do, yes.

25 Q. Doctor, I believe you testified before that my client's

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April - recross

1 pain was mild. Is this correct?

2 A. No, I didn't testify to that. I testified that on these  
3 records there is a circle around severity of the pain that says  
4 mild.

5 Q. Doctor, I will ask you to look at this record. It's the  
6 portion of the report from Cabrini Hospital. It's on your  
7 screen as well.

8 A. You're going to have to identify who wrote it and under  
9 what part of this examination it is, if you don't mind.

10 Q. Doctor, this is Cabrini Medical Center comprehensive pain  
11 management and this is part of the medical records of this  
12 case.

13 A. This is not the emergency room.

14 Q. This is absolutely the emergency room.

15 A. Then I don't see it at all on any records that I have or I  
16 remember looking at. So could you identify it in the body of  
17 the chart? Because I don't know who wrote it. That's the  
18 problem.

19 Q. Doctor, does this refresh your recollection?

20 A. No. But, all right. I see what you're looking at. Thank  
21 you. Yes.

22 Q. Could you tell us what is the patient's pain intensity  
23 rating that you can see in front of you from zero to ten, ten  
24 being the highest?

25 A. Right here it says nine and on this other sheet it says

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April - recross

1 mild and I don't know who filled this out, but at the bottom of  
2 the page there is an important statement, if you can just go  
3 down to it.

4 Q. Doctor, I want to thank you for your testimony.

5 THE COURT: You're excused. Thank you very much.

6 (Witness excused)

7 THE COURT: Anything further from the defendant?

8 MR. COFFEY: No. The defendants rest.

9 THE COURT: Ladies and gentlemen, we are going to give  
10 you, having spent all this extra time with us tonight to make  
11 sure that the experts all got one day rather than two days of  
12 fees, we are going to give you until 11 to come in tomorrow so  
13 that the lawyers and I can have what we call a charging  
14 conference to work out what the charge should say.

15 And then when you come at 11, there will be first  
16 summations and then the government in its largess will order  
17 your lunch and pay for it. And as soon as we are finished with  
18 lunch we will have a charge on the law from me. So need not  
19 come in until 11. Don't start salivating. The food is not all  
20 that great, but nonetheless, we will see you at 11:00.

21 Have a good evening, and thanks for being here this  
22 late. Do not discuss the case with anybody. This is not your  
23 case yet.

24 (Jury not present)

25 THE COURT: I have put together from all your

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1 appropriate charges and verdict sheets one that I'm continuing  
2 to play with, but I will give it to you at 9:30 in the morning  
3 and then we will go over it together. I would give it to you  
4 now, but I haven't gone over it myself. But I have all of  
5 yours.

6 Again, we are pretty much confined now under this  
7 short time period to what I've gotten from you, but,  
8 nonetheless, if you send us something this evening, we will at  
9 least be able to look at it. Do not bring it to the charging  
10 conference because I guarantee you we will not be looking at it  
11 there.

12 Good night.

13 MR. COFFEY: Thank you, your Honor, for accommodating  
14 the experts.

15 THE COURT: That was probably a 2,000 or 3,000 dollar  
16 deal.

17 MR. COFFEY: Your Honor had mentioned we could put in  
18 a motion for our fee for the subpoenaed --

19 THE COURT: They have all been made and they have all  
20 had decision reserved.

21 MR. COFFEY: No. That was this afternoon when your  
22 Honor had mentioned about Mr. Platta had subpoenaed our expert  
23 witness. You said you would entertain a motion.

24 THE COURT: For what?

25 MR. COFFEY: For him to pay for the person that he

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1 subpoenaed.

2 THE COURT: You can tell me about that, if you'd like.

3 MR. COFFEY: I would just make that motion because we  
4 brought him here.

5 As he was about to rest he walked outside to serve the  
6 plaintiff's expert with a subpoena, our expert with a subpoena.

7 THE COURT: That sounds not so dumb to me.

8 MR. COFFEY: We would request that he pay the expert  
9 fee for today.

10 THE COURT: I'm not that big an expert on expert fees,  
11 but it seems to me that for the most part it was you who did  
12 the preparing for this expert and you who essentially  
13 contracted with him and you who will undoubtedly will be paying  
14 him.

15 MR. COFFEY: Thank you, your Honor.

16 THE COURT: I'm not asking for any part of that.

17 Good night. 9:30 in the robing room, which is right  
18 down that hall. You'll have a personal escort.

19 (Adjourned to September 10, 2008, at 9:30 a.m.)

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